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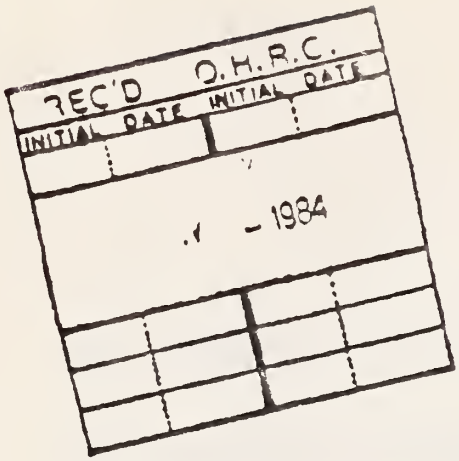

DECISION

THE HUMAN RIGHTS CODE, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982.

IN THE MATTER OF:

The Complaint made by Ms. Cindy Cameron of Newcastle, Ontario, alleging discrimination with respect to employment because of her handicap by Nel-Gor Castle Nursing Home, its servants and agents, and Mrs. Merlene Nelson and Mrs. Marvis Solimano contrary to subsection 4(1) and section 8 of the Human Rights Code, 1981, S.O. 1981, c. 53.

APPEARANCES:

Ms. Michelle Smith, and Mr. David Lepofsky, Counsel for the Ontario Human Rights Commission and the Complainant.

Mr. Larry Levine and Ms. Jodi Wasser, Counsel for the Respondents.

A HEARING BEFORE:

Peter A. Cumming, Q. C., a Board of Inquiry in the above matter, appointed by the Minister of Labour, the Honourable Russell H. Ramsay, November 14, 1983.

CONTENTS

1.. INTRODUCTION.

This Board of Inquiry is unique in two very significant aspects: first, it is the first board of inquiry to hear a Complaint under the Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982 (hereafter, the "Code"); and second, it is the first case under Ontario human rights legislation to deal with "handicap" as a prohibited ground of discrimination, as that was not a ground of discrimination until passage of the new legislation in 1982.

The Complainant, Cindy Cameron, of Newcastle, Ontario, alleges in her Complaint dated December 1, 1982 (Exhibit # 2) that the Respondent, "Nel-Gor Castle Nursing Home" (hereafter "Nel-Gor"), and its servants and agents, the Respondents, Mrs. Merlene Nelson and Mrs. Marvis Solimano, contravened subsection 4(1) and section 8 of the Code, which read:

> 4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of ... handicap.
>
> ...
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

During the proceedings, the Complaint was withdrawn as against the individual Respondent, Mrs. Marvis Solimano. Mrs. Merlene Nelson is the Administrator of the Respondent, Nel-Gor, and also an equity owner of Nel-Gor.

I was appointed (Exhibit # 1) as a Board of Inquiry with respect to Ms. Cameron's Complaint by the Honourable Russell H. Ramsay, the Minister of Labour, pursuant to

section 37 of the Code. The hearing took place over seven days, including the hearing of oral argument, having commenced November 29, 1983, and being concluded April 3, 1984.

This Board of Inquiry was aided by the very competent and thorough oral and written arguments made by counsel for both the Commission and the Respondents.

As this is the first board of inquiry to hear a Complaint under the new Code, and the first case under Ontario human rights legislation to deal with "handicap" as a prohibited ground of discrimination, it is purposeful first, to review briefly the history of human rights legislation in Ontario and Canada, and second, review generally the law with respect to "handicap" as a prohibited ground of discrimination, before proceeding to deal with the evidence given before this Board of Inquiry.

2. THE EVOLUTION OF HUMAN RIGHTS THROUGH INTERNATIONAL LAW.

The second half of the twentieth century has been marked by significant international initiatives for the protection of human rights. Canada has made important contributions to international efforts to protect human rights, and international law has, in turn, influenced domestic human rights legislation. The atrocities of the Second World War brought increased recognition in the world community of the need for the protection of human rights internationally. Perhaps the United Nations and the International Bill of Human Rights are the most significant products of international efforts to protect human rights.

(See generally, "Tomorrow's Rights in the Mirror of History", by Noel A. Kinsella (Chairman of the New Brunswick Human Rights Commission) in Gerald Gall, ed. Civil Liberties in Canada: Entering the 1980s. (Butterworths: Toronto. 1982)).

The Atlantic Charter.

After Nazi forces overran a large part of Europe a joint statement was made by President Roosevelt and Prime Minister Churchill to the effect that international cooperation on human rights was necessary. Within a few months, the Grand Alliance was signed (Jan. 1, 1942). The Grand Alliance emphasized the need for an international body which could protect human rights and stabilize international relations. In 1943, at the Moscow conference (U.S., U.S.S.R., U.K. and China) a declaration was signed confirming the principles behind the Alliance, that greater attention needed to be given to human rights.

The United Nations Charter.

On April 25, 1945 the founding meeting of the United Nations opened in San Francisco, with Canada participating, and at the conclusion of this historic meeting, the United Nations' Charter was signed. The second paragraph of the Charter explicitly reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ...". The Charter set down the operating principles of the U.N. "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

The Charter has influenced Canadian law. For example, this is seen in the case of Re: Drummond Wren (1945) O.R. 778, (1945) 4 D.L.R. 674 (H.C.). That case involved a restrictive covenant providing that a certain parcel of land not be sold to "Jews or person of objectionable nationality". In striking down the restrictive covenant, Mr. Justice MacKay wrote:

> ...of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The preamble to this Charter reads as follows:
>
> We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... and for these ends to practice tolerance and live together in peace with one another as good neighbors...
>
> Under articles 1 and 55 of the Charter, Canada is pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

There has been much debate among lawyers and academics as to the legal effect of the Charter. One view is that the Charter is not legally binding on nations and should be interpreted merely as a statement of principles. (See, Manley O. Hudson, "Integrity of International Instruments" (1948), 42 A.J. Int. L. 105-108). Others view the Charter as placing a legal obligation on member states to observe human rights as provided for in the document. (See, John P. Humphrey, "The World Revolution and Human Rights", Human Rights, Federalism and Minorities ed. Allan Gotlieb (Toronto: Canadian Institute of International Affairs, 1970) pp. 147-79).

The United Nations' Human Rights Commission.

Under Article 68 of the Charter, a Human Rights Commission was established in 1946. The first item on the agenda of the Commission was to prepare an International Bill of Rights. In 1948 a draft Bill was presented to the meeting of the United Nations General Assembly in Paris and the Universal Declaration of Human Rights (UDHR) was signed. The UDHR is a common standard of conduct for all people and nations, transcending ideologies and divergent philosophies to recognize certain fundamental human rights.

The UDHR has greatly influenced the enhancement of human rights in Canada. Several provincial human rights Acts make specific reference to it. For example, the preamble to the Ontario Human Rights Code, 1981, provides:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations...

The Ontario Human Rights Code, R.S.O. 1980, c. 340, (hereafter the old Code) sets forth this first statement in its preamble as well.

Further, the former chairperson of the Ontario Human Rights Commission, and recently appointed Ombudsman for Ontario, Dr. Daniel Hill, has stated that "we constantly assert that the Universal Declaration is the basis of our legislation and the primary source of inspiration in our work."

The UDHR was the first step toward achieving international protection of human rights. In 1954 the General Assembly decided that two distinct human rights covenants should be drafted to supplement and enhance the more general UDHR: one dealing with

civil and political rights, and the other with economic, social and cultural rights (Gen. Ass. Res. 543 (VI), 6th Sess., plenary meeting 375m 1954).

In December of 1966 the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the latter.

Canada moved to ratify these international covenants and through the work of a number of provincial human rights commissions and federal-provincial meetings, Canada ratified the Covenants in May of 1976.

3. THE PREAMBLE TO THE ONTARIO HUMAN RIGHTS CODE, 1981.

The preamble to the new Code describes both the underlying philosophy of human rights in Ontario as well as the public policy sought through this legislation. These statements constitute first principles and should never be overshadowed by the technical operating regulations and guidelines.

The preamble of the Code indicates that:

> ... it is the public policy in Ontario to recognize the dignity and worth of every person and to provide for equal right and opportunity without discrimination that is contrary to law ....

The preamble goes on to say that the aim of this policy is to create a climate in which the:

> ... dignity and worth of each person ... (is recognized) ...so that each person feels a part of the community and able to contribute fully to the development and well-being of the community....

The new Code came into force June 15, 1982, which is, not coincidentally, the anniversary date of the Magna Carta, agreed to on June 15, 1215. While it is wrong to say that the Magna Carta quaranteed individual liberties to all men (rather, King John was forced primarily to grant many rights to the English aristocracy) the Magna Carta placed the king under law, decisively checking the royal power, and this tenet became recognized as part of the fundamental law of England. Human rights legislation, as set forth in the Ontario Human Rights Code, 1981, has advanced considerably from its early roots in English law.

Essentially, the public policy underlying the Code seeks to rectify the denial of equality with respect to the inalienable basic rights of minorities and women and to enable them to realize their full potential as individuals and participate fully in society for the benefit of all people in Ontario.

Futher, section 10 of the Interpretation Act, R.S.O. 1980, c. 191 must be kept in mind:

> Every Act shall be deemed remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The preamble has been cited in several Ontario Boards of Inquiry, including Alvin Ladd v. Mitchell's Bay Sportman Camp, (Anderson, 1963 unreported), Singh v. Security and Investigation Services Ltd. (Cumming, unreported, May 31, 1977) and Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo Sequin v. Colfer and McAdam (Cumming, unreported, January 12, 1979).

4. THE DEVELOPMENT OF ANTI-DISCRIMINATION LEGISLATION IN ONTARIO AND CANADA.

Pre-Second World War.

Anti-discrimination legislation in Canada can be traced back to pre-Confederation Acts to discontinue and abolish slavery. Lower Canada in 1793 enacted "An Act to prevent the further introduction of Slaves and to limit the term of contracts for servitude within this Province" (S.U.C. 1793 (2nd Sess.) c. 7). This was prior to the Imperial Parliament Act for the Abolition of Slavery which extended such a law into the colonies generally, in 1833. (3 & 4 Will. IV. c. XXIII).

The next step in the development of anti-discrimination legislation pertained to the treatment of immigrant labourers brought to work in the railroad and mining industries in British Columbia. Historically, legislation had been passed which seriously impaired the human rights of the immigrant labour force - notably, immigration from Asian countries was severely restricted: The Chinese Immigration Act S.C. 1885, c. 71; and the franchise was withheld from Asiatics, as well as Native people: Dominion Elections Act S.C. 1900, c. 12; The War-Time Election Act, S.C. 1917, c. 39. Other disabilities had been imposed on Asiatics - head taxes, restrictions in respect of land ownership, restrictions on employment and business activity, and perhaps the most infamous of all: the restriction on employment of white females (considered in Quong-Wing v. The King (1914) 49 S.C.R. 440). The internment of Canadians of Japanese racial origin during and after the Second World War, together with the confiscation and sale of their property, is viewed by many as a disgraceful denial of basic human rights.

The common law disabilities with respect to women, and the legislative responses to this must also be considered in the evolution of human rights legislation in both Ontario and Canada. (See H.R. Hahlo, "Matrimonial Property Regimes" (1973) 11 O.H.L.J. 455).

Since the Second World War, the legislative schemes, referred to supra, which discriminated against certain groups, have been repealed, with the exception of discriminatory provisions contained in the Indian Act R.S.C. 1970, c. I-6, s. 12 (1)(b), in respect of the loss of status by Indian women who marry non-status persons. (See A. G. Can, v. Lavell, (1974) S.C.R. 1349; and Lovelace v. Canada (1981), U.N. Doc. CCPR/C/DR (XIII)). The federal Government has announced recently that it intends to remove this instance of discrimination by federal statute, as it offends sections 15 and 28 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I.

Early case-law concerning the denial of equality or human rights centered upon the British North America Act, 1867, (now the Constitution Act, 1867,) which makes no reference to egalitarian human rights. The courts dealt with human rights issues only cursorily as incidental to the constitutional division of powers and the question of jurisdiction to legislate.

Key cases in this area include Union Colliery v. Bryden (1899) A.C. 580, and Cunningham v. Tomey Homma (1903) A.C. 151, in which the approach taken by the courts was to address simply the narrow question of jurisdiction rather than the propriety of legislation affecting human rights.

Re Noble and Wolf v. Alley (1951) S.C.R. 64, and Re Drummond Wren (1945) O.R. 778 involved restrictive covenants limiting the resale of land to certain racial groups. The covenants were struck down for reasons of uncertainty and property law considerations as to covenants which could not run with the land, rather than on the basis of offending public policy.

As a result of great judicial restraint in human rights cases, the Provincial legislatures and Parliament moved to enact anti-discrimination legislation which would provide positive support for the existence of human rights in both the provincial and federal sphere.

Professor Water Tarnopolsky (now Mr. Justice Tarnopolsky of the Ontario Court of Appeal) notes:

> It is no wonder, then, that the legislatures, with no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which have largely been taken out of the court. (Tarnopolsky, W.S., Discrimination and the Law in Canada, (Richard De Boo Ltd., 1982, p. 24).

Anti-Discrimination Leglislation.

It was not until near the end of the Second World War that modern human rights legislation developed. The Ontario Racial Discrimination Act S.O. 1944 c. 51 s. 1, prohibited the publication or displaying of symbols which expressed racial or religious discrimination. The first detailed human rights statute in Canada was the Saskatchewan Bill of Rights Act S.S. 1947 c. 35, now R.S.S. 1979, c. S-24.1. The Saskatchewan Bill dealt not only with human rights but also with political civil liberties. The legislation was enforced through penal sactions (fines, imprisonment); thus it was a "quasi-criminal" statute and there was no provision for a specifically formed government agency which could administer and enforce the Act.

The criminal nature of this legislation presented several problems: victims were reluctant to initiate criminal actions, the judiciary was reluctant to impose sanctions, and the penal sanction was of little assistance to the victim. To overcome the weaknesses of this type of legislation, fair accommodation and fair employment practices laws were enacted which provided for the assessment of complaints, conciliation, and the establishment of boards of commissions of inquiry. The first legislation of this nature had been passed in New York in 1945: N.Y. Public Laws of 1945, c. 118.

In 1951, Ontario pioneered the first such statute in Canada with enactment of The Fair Employment Practices Act S.O. 1951, c. 24. Other provinces soon followed suit. Legislation dealing with equality of access to "the accommodation, services or facilities available in any place to which the public is customarily admitted" was enacted in Ontario with the Fair Accommodation Practices Act, S.O. 1954, c. 28, s. 2. This legislation was amended in 1961 to include "occupancy of any dwelling unit in any building that contains more than six self-contained dwelling units", S.O. 1960-61, c. 28, s. 2. Other provinces followed Ontario's lead here as well.

In the area of employment, two other forms of discrimination soon came to be prohibited by statute; these were sex and age. In Ontario an Equal Pay Act was enacted, S.O. 1951, c. 26, and an Elimination of Age Discrimination Act was enacted, S.O. 1966, c. 3.

Tarnopolsky notes of this approach:

> The fair employment and fair accommodation practices Acts were designed to improve the defects inherent in the quasi-criminal approach to human rights legislation. In the place of the laying of an information leading to a prosecution, provision was made for the filing of complaints, followed by the administrative proceedings of investigation, conciliation and settlement. However, this legislation continued to place the whole emphasis of promoting human rights upon the individual who had suffered most, and who was therefore in the least advantageous position to help himself. It placed the administrative machinery of the state at the disposal of the victim of discrimination, but it approached the whole problem as if it were solely his problem and his responsibility. The result was very few complaints were made, and very little enforcement was achieved. (See Tarnopolsky, W. S., Discrimination and the Law in Canada, Richard De Boo Ltd., 1982, pp. 29-30).

The recent constitutional entrenchment of basic human rights, through the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, is, of course, a most significant event. The effect of the Charter of Rights and Freedoms remains to be seen: see generally, Comment, "The Effect of the Charter of Rights on Non-Criminal Law and Administration", John D. Whyte, (1982) 3 C.H.R.R. C/82-7, Comment, "Hate Propaganda Laws - Will They Survive the Charter of Rights?", Heather Sinclair, (1982) 3 C.H.R.R. C/82-13, and Comment, "Sex Discrimination Under The Charter: Some Problems Of Theory", Wendy W. Williams, (1983) 4 C.H.R.R. C/83-1.

Subsection 15(1) of the Charter provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

However, because of Section 32(2) of the Charter, this provision does not come into effect until April 15, 1985. When it does take effect, it may render some provisions of human rights legislation inoperative or unconstitutional. See Harry C. Prior v. The Canadian National Railway Company, a decision of a Review Tribunal under The Canadian Human Rights Act, rendered February 2, 1983, at 24.

The Ontario Human Rights Code.

The first comprehensive legislative human rights scheme was enacted by Ontario in 1962 with the Ontario Human Rights Code, S.O. 1961-62, c. 93. The Human Rights Commission replaced the Anti-Discrimination Commission established by S.O. 1958, c.

70. Unlike earlier enactments, the 1962 Code was not directed at discrimination in one particular area, but was directed at a number of fields. Further, the Code, through the Commission, provided for the administration, public education, promotion and enforcement of human rights in Ontario. Other provinces followed suit, and in 1977 the Parliament of Canada also enacted a comprehensive anti-discrimination statute, with a Commission to administer it: Canadian Human Rights Act, S.C. 1976-77, c. 33.

The objectives and purposes of a human rights commission enforcing human rights were summarized by Dr. Daniel Hill, formerly Director, and then Chairman, of the Ontario Human Rights Commission:

> Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of dispassionate socio-scientific materials that are used to challenge popular myths and stereotypes about people ... Human Rights legislation on this continent is the skillful blending of educational and legal techniques in the pursuit of social justice. ("Merchants of Hate", Human Relations, June 1965, published by the Ontario Human Rights Commission 4).

The 1962 Code has been amended several times, and the effect generally has been to widen the scope of its provisions (S.O. 1965, c. 85; 1967, c. 66; 1968, c. 85; 1968-69, c. 53 R.S.O. 1970, c. 318, R.S.O. 1972, c. 119, R.S.O. 1980, c. 340). The present Code (Human Rights Code, 1981 S.O. 1981, c. 53) is not an amendment but a completely new legislative scheme.

5. THE ONTARIO HUMAN RIGHTS CODE, 1981.

The new Code is divided into five parts: Part I enumerates basic human rights and Part II sets forth provisions for the interpretation and application of the substantive

rights protected by Part I. Part III continues the Ontario Human Rights Commission and sets forth its functions. It also creates a race relations division of the Commission. Part IV covers the investigation and settlement of complaints; and provides for boards of inquiry. Part V includes some additional definitions and a primacy clause which takes effect "two years after this Act comes into force", that is, June 15, 1984. (See generally, Keene, J., Human Rights in Ontario, Carswell, 1983, pp. 1-10.)

The new Code differs from its predecessor in its style, organization, and content. A difference in approach is reflected in the wording of its provisions. The new Code speaks positively of inalienable rights of every person, not simply of prohibitions. Further, the Code is specific with respect to its exceptions and rules of application. Several important specific principles have been codified (notably constructive discrimination, harassment and vicarious liability) which is a departure from the more general approach of the previous Code. Finally, the addition of new prohibited grounds of discrimination means a broadened jurisdiction; the most important new ground being 'handicap'.

The fundamental rights of every person to equal treatment are protected, by law, in five main areas: the provision of services, goods and facilities (section 1), the occupancy of accommodation (section 2), entering into contracts (section 3), employment (section4), and membership in trade unions, trade or occupational associations, and self-governing professions (section 5). (See generally Thea P. Herman, "The Code: Changes, Impact, Potential", from The Law Society of Upper Canada Continuing Legal Education, Human Rights. June 24, 1983).

Rules on Interpretation and Application.

The new Code attempts to clarify the scope of discrimination and codify some of the principles which were heretofore applied through the development of the case law which depended on the very general language of the old Code. The old Code simply prescribed certain conduct: "No person shall (discriminate) because of", but the new Code expressly emphasizes affirmatively the rights of the individual, rather than simply implicitly affirming such rights by prohibiting the conduct of the discriminator.

The Code does not define the term "discrimination", although many of its provisions indicate its scope. "Equal" has been defined (by paragraph 9(c)) as "subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination". Therefore, persons can be subject to various criteria with respect to the provision of services, the occupancy of accommodation and employment opportunities as long as considerations do not include a prohibited ground of discrimination. Other changes include:

(1) The codification of discrimination because of association in section 11 (a response to Jahn v. Johnstone, Ontario Board of Inquiry, 1977, Eberts, unreported).

(2) primacy: the entire new Code is binding upon the Crown by virtue of subsection 46(1): with an exception for special programs in subsections 13(1),(5).

(3) vicarious liability applies (section 44) in all cases except harassment (subsections 2(2), 4(2) and section 6) and where the offence provision (section 43) has been invoked: this codification was in part a response to the B.C. decision of Nelson v. Byron Price Associates Ltd. (1981), 2 C.H.R.R. D/385 (B.C.C.A.), and in part a codification of the case law position as developed in Ontario: see Olarte et al v. Commodore Business Machines Ltd. and DeFilippis, (1983) 4 C.H.R.R. D/1705 at D/1737-D/1747.

(4) constructive discrimination: section 10 is an attempt to codify the concept of non-intentional discrimination. It provides that a right is infringed where a non-discriminatory "requirement, qualification or consideration" results in the "exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination" (and of whom the complainant is a member) except where the requirement is a "reasonable and bona fide one in the circumstances". (This provision is a response to O.H.R.C. v. Simpsons-Sears Ltd., (1982), 36 O.R. (2d) 59 (Div. Ct), 38 O.R. (2d) 423 (O.C.A.)), appeal pending to the Supreme Court of Canada, and a codification of the case law position as developed in Ontario prior to the Simpsons-Sears case: see Singh v. Security and Investigation Services Ltd. (Cumming, unreported, May 31, 1977). Until the Simpson-Sears decision, supra, boards of inquiry had held that there could be a breach by an employer of section 4 of the old Code, where there was no intent to discriminate but simply constructive discrimination, for example, by a neutral employment requirement or qualification that knowingly results in the exclusion of women, and the requirement or qualification is not a reasonable and bona fide one in the circumstances - Ann J. Colfer v. Ottawa Board of Commissioners of Police and Ottawa Police Chief Leo J. Seguin (Cumming, unreported, Jan. 13, 1979). The same issue has arisen in respect of a complaint under the Canadian Human Rights Act, in Bhinder v. Canadian National Railways, (1981), 2 C.H.R.R. D/546, the decision of the Federal Court of Appeal (LeDain, J. disenting), in reversing the Tribunal's finding, holding that constructive discrimination is not covered by the federal legislation:an appeal is pending to the Supreme Court of Canada.

> Constructive discrimination is for the first time specifically prohibited, that is, imposing a qualification of some kind which would result indirectly in disqualifying a group of persons who are identified by a prohibited ground of discrimination. There are, of course, exceptions where the qualification is found to be reasonable and bona fide. (Bill 7, Second Reading. May 15, 1981, Hon. Dr. Robert G. Elgie, Minister of Labour. (Hansard No. 21, p. 743)).

(5) special programs: section 13 provides an exception for affirmative action programs and a mechanism for prior approval thereof: the Commission also has the power to recommend that a special program be implemented (paragraph 28(c)).

Procedures and Enforcement:

The basic mechanism of enforcement, The Ontario Human Rights Commission, remains intact under the new Code. Key changes in procedures reflect the desire to balance the rights of the complainant and the alleged discriminator, the respondent. Some of the salient points of procedure to mention are as follows:

(1) Any person who believes that his or her rights have been infringed may file a complaint (s. 31(1)). This is perhaps broader than the previous "reasonable grounds for believing" in subsection 15(1) of the old Code.

(2) The Commission may initiate a complaint by itself or at the request of any person (subsection 31(2)). The Commission also has the power to join the complaints and deal with them in the same proceeding (subsection 31(2)).

(3) The Commission may refuse to deal with certain complaints under subsection 31(1) when it feels the complaint could be dealt with more appropriately under other legislation (such as the Employment Standards Act); the Commission may also refuse to handle complaints which appear "trivial, frivolous, vexatious or made in bad faith", and also when it appears to the Commission that it lacks jurisdiction or when the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied the delay was incurred in good faith and no substantial prejudice will result by the delay (section 33).

(4) The investigation powers are similar to those under the old Code with the exception that human rights officers may only request documents instead of require them to be produced (section 32), and must obtain a search warrant from a justice of the peace if a request has been denied and the officer believes documents afford evidence relevant to the complaint.

(5) There are new provisions for a "binding" settlement in section 42, a breach of which constitutes, in itself, grounds for a complaint under section 3: Part IV would apply to the complaint in the same manner "as if the breach of the settlement were an infringement of a right under this Act".

(6) When the Commission fails to effect a settlement, the Commission "may request" the Minister to appoint a board of inquiry (subsection 35(1)) whereas under the old Code, the Commission had to make a recommendation whether or not a board should be appointed, and the Minister would then, in his/her discretion decide whether to appoint a board of inquiry (subsection 17(1) of the old Code).

(7) There are statutory limitations in the new Code: (i) a board must convene within thirty days after its appointment (ii) and the decision must be rendered within one month after the hearing (subsections 38 (1), (7)).

6. THE DEVELOPMENT OF "HANDICAP" AS A PROHIBITED GROUND OF DISCRIMINATION.

The common law embodies no general principle that handicapped persons are entitled to equality of rights under the law, or even fair treatment by government. The notion of equality under the law for handicapped persons is a recent one and has only been recognized in Canada since the late 1960's through statutory development.

The common law has not afforded relief from discrimination in contract: Bhaduria v. Board of Governors of Seneca College of Applied Arts and Technology (1979), 105 D.L.R. (3d) 707; 270. R. (2d) 142. However, a narrow qualification to this generalized statement about the common law is found in the context of municipal law: municipal bylaws with respect to economic regulation may not be discriminatory unless clearly authorized by enabling legislation. (See Bunce v. Town of Cobourg (1963) 2 O.R. 343). Moreover, there have been instances where the common law has adapted to accommodate the peculiar circumstances confronting a disabled individual. In Gallie v. Lee, (1972) 88 L.R.Q. 190, the English Court of Appeal held that the contractual non est factum doctrine applied in the case of a deed executed by a blind person who was misinformed as to the nature of the agreement.

Instances of inequality are more apparent from a review of the common law cases. For example, the Royal Prerogative has traditionally included a broad power to incarcerate mentally ill or otherwise mentally handicapped persons, without necessarily according the procedural safeguards of natural justice: see R. v. Saxell, (1980) 59 C.C.C. (2d) 176 (OCA) st 183.

'Handicap' developed as a prohibited ground of discrimination in Canada in the 1970s through legislation. Although none of the codes originally recognized handicap as an explicitly prohibited ground of discrimination, recent amendments have seen the inclusion, in one form or another, of protection against discrimination on the basis of handicap in nearly every jurisdiction in Canada.

Overview of Legislation in Canada dealing with Handicap.

(1) Newfoundland.

Bill 23 enacted by the legislature in 1981 extended the Newfoundland Human Rights Code S. Nfld. 1969, No 75. S.Nfld. 1981, c. 82, to cover discrimination on the basis of handicap.

Newfoundland also has the Building Accessibility Act, R.S. Nfld, 1970 c. 27 (as amended by S. Nfld 1981, c. 90) which provides minimum standards for access to buildings and requires facilities for handicapped persons in all new or reconstructed buildings after 1978, with certain exemptions (sections 6 and 7).

(2) Prince Edward Island.

Discrimination on the basis of "physical disability" is prohibited by virtue of the Human Rights Act S.P.E.I. 1974, c. 24 amended by S.P.E.I. 1982, c. 9. It defines physical disability, in paragraph 1(1)(l), as:

> Any degree of disability, infirmity, malformations or disfigurement of the body suffered by a person, as a result of injury, illness or birth defect, and includes any disabling condition resulting from epilepsy, paralysis, lack of coordination, amputation, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or reliance upon a seeing eye dog, wheelchair, cane or crutch or other remedial appliance or device.

The Rehabilitation of Disabled Persons Act, (S.P.E.I. 1974 R-12) the Disabled Person's Allowances Act (S.P.E.I. 1974, D-11) both enacted in 1974, provide financial and material assistance to the disabled.

(3) Nova Scotia.

The Human Rights Act S.N.S. 1969 c. 11 as amended, includes physical disability as a prohibited ground of discrimination. Subsection 11B(2) of the Act defines a physical handicap to be:

> ... a physical disability, infirmity, malformation or disfigurment which is caused by bodily injury, birth defect or illness and includes epilepsy and, but is not limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical

> reliance on seeing eye dog, wheelchair, or other remedial appliance or device.

Other areas of concern dealt with through specific legislation are: the Building Access Act, S.N.S., 1976 c. 7 (as amended) which sets formal standards for construction of public buildings based upon the National Building Code of Canada; the Health Services Tax Act, S.N.S. 1967 c. 126 (as amended) provides rebates on passenger vehicles or trucks which are adapted to be driven by, or to transport, disabled persons.

(4) New Brunswick.

New Brunswick was the first province in Canada to add specifically "physical disability" as a prohibited ground of discrimination under its Human Rights Code, S.N.B. 1976, c. 31 (as amended). This prohibition extended to all areas of employment, except in the case of "bona fide occupational requirements". The New Brunswick legislature has also adopted the National Building Code standards of accessibility for handicapped persons.

(5) Quebec.

Equal rights for disabled persons are protected in the Charter of Human Rights and Freedoms S.Q. 1975 c. 6 (as amended). The Charter employs the term "handicapped" in section 10 and defines it as:

> 'handicapped person' or 'the handicapped' in the plural, means a person limited in the performance of normal activities who is suffering, significantly and permanently, from a physical or mental deficiency or who regularly uses a prothesis or an orthopedic device or any other means of palliating his handicap.

It is significant that the definition of handicap includes mental handicap. Along with Ontario, Quebec is the only province to guarantee rights to mentally handicapped

persons in its human rights legislation.

The Quebec Charter also provides for an administrative body, L'office des personnes handicapees, to promote the rights and needs of the disabled, requires transportation bodies to set up special transportation for the handicapped, requires telephone companies under provincial jurisdiction to arrange for services for the disabled, and requires buildings to be accessible to the handicapped within five years. As well, a provision not yet proclaimed in force will require affirmative action programmes for handicapped persons in certain situations.

(6) Manitoba.

The Human Rights Act S.M. 1970, c. 104 (as amended) prohibits discrimination on the basis of physical disability. "Physical disability" in the Act is defined in essentially the same manner as in Nova Scotia. The provincial Election Act, S.M. 1980, c. 67, allows disabled voters to vote by mail.

(7) Saskatchewan.

The Human Rights Code, S.S. 1972, c. 108 (as amended) prohibits discrimination on the basis of physical disability, which it defines in paragraph 2(n) as:

> any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device.

With respect to employment, the Saskatchewan Code recognizes that there are jobs for which physical ability is a "reasonable occupational qualification". If an employer can demonstrate that a certain physical ability is required to fulfill the duties

of a position to be fulfilled safely then a discriminatory employment requirement can be maintained.

(8) Alberta.

The Individual Rights Protection Act, S.A. 1972, c. 2 (as amended) extends protection against discrimination to the physically disabled. The Alberta Uniform Building Code, R.S.A. 1980, c. U-4, requires that public buildings open to the public be accessible to handicapped persons.

(9) British Columbia.

The British Columbia Human Rights Code, S.B.C., 1973 (2nd Sess.) c. 119 does not expressly extend protection against discrimination to the physically or mentally handicapped. However, a Board of Inquiry in 1976, in the case of Jefferson v. B.C. Ferries Services, held that physical handicap was included in the Code's general prohibition against discrimination "without reasonable cause". In that case, however, the Board found that the denial of employment was based on a reasonable ground not related to the complainant's amputation. The British Columbia Building Code, S.B.C., 1972 c. 65, requires that public buildings be accessible, in certain circumstances, to handicapped persons.

In 1983, Bill 27 was introduced to amend the British Columbia Human Rights Code. The effect of the Bill would be to remove the "reasonable cause" protection and thereby prohibit discrimination only on the grounds specifically named in the Bill. This would, in effect, set aside the Jefferson protection which considered discrimination because of handicap to be covered by the "without reasonable cause" protection.

While Bill 27 adds "physical and mental disability" to the list of prohibited grounds in all sections of the Bill, because such grounds were already subsumed by the "reasonable cause" provisions, the actual protection to people with disabilities may be reduced, because it seems all complainants will have to prove an intent to discriminate under the new legislation, and hence, protection against systemic and unintentional

legislation is removed. Comment, "Notes On B. C.'s Bill 27 (Human Rights Act)," William Black and Lynn Smith, (1983) 4 C.H.R.R. C/83-11, C/83-13.

(10) Yukon and Northwest Territories.

Fair Practice Ordinances have been enacted for both Yukon and the Northwest Territories which prohibit discrimination in employment and accommodation; however, they do not expressly provide protection for handicapped persons: O.Y.T. 1963 (2nd) c. 3, now R.O.Y.T. 1976. c. F-2, O.N.W.T., 1966 (2nd) c. 5, now R.O.N.W.T. 1974, c. F-2.

(11) Canada.

Section 20 of the Canadian Human Rights Act S.C. 1976-77, c. 33. provides protection against discrimination on the basis of mental or physical disability. "Physical disability" is defined as:

> ...a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, any physical reliance on a seeing eye dog or on a wheelchair or other remedial appliance or device.

Ontario: Development of Handicap as a prohibited ground of discrimination.

In its report, Life Together: A Report on Human Rights in Ontario (Ontario Human Rights Commission 1977, pp. 72-79), the Commission recommended that physical handicap be included as a prohibited ground of discrimination in the Ontario human rights legislation.

> For years, many of the people who are physically disabled in one way or another have been segregated from the rest of society in special

> schools or institutions where they could be "protected" and kept out of sight. However well-intentioned this practice may have been, the result has often been a denial of the human rights of disabled people, and the loss to society of the contributions these people could have made. (p. 73).

In response to this, the Ontario Government introducted Bill 188/79 entitled an Act to Provide for Rights of Handicapped Persons. The Bill provided that "no person shall knowingly discriminate against a person on the ground of handicap (broadly defined) ...". Discrimination was limited to intentional conduct which could not be characterized as reasonable and bona fide.

Bill 188 was rejected by representatives of the handicapped community, not only because it was viewed as affording second class protection to handicapped persons, but also because separate legislation was considered inherently discriminatory.

The government withdrew this Bill and replaced it approximately a year later with omnibus amendments to the Human Rights Code which included protection for handicapped persons. Bill 209, as it was called, died on the Order Paper when an election was called. It was replaced by Bill 7 in 1981, which later became the present Human Rights Code, R.S.O. 1981, c. 53, and superceded the previous Code which was repealed.

The Hon. Dr. Robert G. Elgie, Minister of Labour, stated in respect of Bill 7, at Second Reading, May 15, 1982 (Hansard No. 21, p. 741):

> Protection in all areas - employment, accommodation and the provision of goods and services - is extended to the mentally and physically handicapped. Past, present and perceived handicaps are included and "handicap" is defined to include physical disability, mental retardation, learning disability, and mental illness. I believe this definition to be as broad as or broader than that in any comparable legislation in any other jurisdiction.

> The new code will protect the victims of past injuries, including those who have received workmen's compensation benefits, against discrimination on the grounds of their disabilities, subject only to bona fide occupational qualifications. Discrimination on the ground of handicap is also prohibited in the provision of services, goods and facilities, housing and commercial accommodation and in contracting, employment and membership in occupational associations and trade unions.

The new Code extends protection from discrimination to handicapped persons in the areas of services, goods and facilities (section 1), occupancy of accommodation (section 2), contract (section 3), employment (section 4) and vocational associations (section 5). All of the foregoing rights are limited by section 16 of the Code which provides:

> 16 (1) A right of a person under this Act is not infringed for the reason only,
>
> (a) that the person does not have access to premises, services, goods, facilities, or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap; or
>
> (b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

The Hon. Dr. Robert G. Elgie has stated the Government's intention in respect of section 16, as follows:

> In each case, the protection is subject to the individuals being able to perform the essential functions associated with the particular activity in question. Obviously an employer must be able to expect any applicant to be capable of performing the job that's available ... a handicapped person will be protected against rejection because he or she cannot perform tasks that are unrelated to a particular job, or constitute only a minor part of the usual responsibilities. (Remarks on Special Concerns of the Physically Handicapped. Robert G. Elgie, M.D., Minister of Labour, to the Canadian Association of Statutory Human Rights Agencies, June 1, 1981, Windsor, Ontario.)

By subsection 24(3), the right to equal treatment with respect to employment because of handicap is not infringed where a reasonable and bona fide distinction is made in an employee disability or life insurance plan due to an increase in risk because of a pre-existing handicap, or in respect of certain employee benefit or pension plans.

In addition to the ordinary powers of a board of inquiry in making an order (subsection 40(1)), upon a finding that there is an infringement of a complainant's right under Part I and a contravention of section 8, subsections 40(2) and (3) allow a board, where the discrimination has been because of handicap, to order the contravenor to take such measures as will allow access or provide amenities or take measures to adapt equipment or duties, to meet the needs of the handicapped, unless the costs of compliance would cause undue hardship and subject to the regulations.

However, a right is not infringed only by reason of lack of access to premises, services, goods facilities or accommodation because of handicap, or accommodation lacks the amenities: paragraph 16(1)(a).

Thus, inherent to paragraph 16(1)(b) and to subsections 40(2) and (3) is the policy premise that there must be affirmative steps to reasonably accommodate an individual's handicap.

Robert Binstock, an Ontario Human Rights Commission investigating officer with the "specially handicapped unit", testified. The unit, formed in July, 1982, after proclamation into force of the Code, consists of a manager and four human rights officers. In the eighteen months since July, 1982, the unit has handled some 3,000 complaints by handicapped persons, 75% of which relate to employment. Mr. Binstock stated that the most common problem complained of by handicapped complainants is that employers prejudge their ability to their disadvantage.

Mr. Binstock also explained the process in respect of a complaint that there is a breach of the Code. Upon the complaint being made (section 31), the investigating stage is commenced (section 32). The complaint is served upon the respondent who is given the opportunity to complete a questionnaire by the Commission so as to answer the allegations of the complaint, providing any pertinent information and names of witnesses. A "fact finding conference' then takes place with the Human Rights Officer, the complainant and respondent all being present. The purpose of this stage is to discuss the allegations and review the evidence. The end of this stage completes the investigation and the Commission may, in its discretion, decide to not deal with the complaint (section 33). The Commission may seek to effect a settlement of the complaint, and if it fails in this regard, may request the Minister of Labour to appoint a board of inquiry (section 35).

Part I of the new Code sets forth the basic human rights, including,

> 4. (1)Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status, family status or handicap.

9. (c) "equal" means subject to all requirements, qualifications, and considerations that are not a prohibited ground of discrimination.

Section 8, the concluding provision to Part I, provides that:

> No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Part II provides further, for constructive discrimination.

> s.10 A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances; or
>
> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

These provisions were discussed at length in Morley Rand et al., v. Sealy Eastern Limited, Upholstery Division (1982) 3 C.H.R.R. D/938, at D/946-D/953.

The new Code is clear in not requiring intent to discriminate, this being set forth expressly by legislative provisions in section 10, and being the position arrived at through the case law as reviewed in Rand in the evolving interpretation of the Code, until the recent court decision in Ontario Human Rights Commission v. Simpson Sears ((1980), 36 D.R. (2d) 59 (Div. Ct.); affirmed Ont. C. A.; appeal pending to the Supreme Court of Canada).

As well, as section 10 of the new Code refers to any situation identified by a "prohibited ground", paragraph 10(a) thus makes clear that a respondent who has enacted a neutral employment condition which has a discriminatry result, may successfully defend by establishing that "the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances". That is, unlike subsection 4(6) of the old Code, there can be no argument that the defence is (reading subsection 4(6) of the old Code simply in a literal sense) limited to situations where "age, sex or marital status" are the prohibited grounds. Thus, section 10 of the new Code expressly extends the defence generally, being that position reached by the evolution of the case law (until the Simpson-Sears decision) in interpreting the old Code.

Finally, it seems clearly implicit to section 10 of the new Code that the onus falls upon the employer to bring himself within the exceptional situation constituting a defence, also being that approach reached by the evolution of the case law under the old Code.

As discussed in Rand, paragraph 10(a) of the new Code provides the employer with a defence "where ... the requirement ... is reasonable ... in the circumstances." The stated legislated standard is "reasonable". An employer who could establish that the employment requirement was reasonable in terms of the needs of his business (for example, a store that was open on Saturdays) would have to go further and establish as well, that she could not reasonably accommodate a particular employee whose creed prevented her from working on Saturdays.

That is, the "reasonable ... in the circumstances" standard of section 10 of the new Code embraces two facets - the employer must show not only that there is an objective real need (it is "reasonable") for the general employment requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in "the circumstances", it is not "reasonable" to be able to do so) by an accommodation of the particular employee. (Alternatively, the employer would have a

successful defence if she could show that while reasonable accommodation was possible, it was offered and refused).

When paragraph 16(1)(b) is considered in conjunction with the powers to remedy confered upon a board of inquiry under section 40, the overall scheme of the legislature becomes clear.

Paragraph 16(1)(b), like section 10, provides for an objective standard that an employer must meet to bring herself within the exception. However, paragraph 16(1)(b), unlike section 10, only partially requires of an employer that she attempt reasonable accommodation of the complainant. Paragraph 16(1)(b) refers to "essential" duties, so that it implicitly requires an employer to reasonably accommodate an employee with a handicap by ignoring her ability to perform or fulfill non-essential duties (see the discussion supra). However, the employer's obligation to reasonably accommodate goes further if there is an infringement by discrimination because of handicap. Subsections 40(2) and (3), provide that a board may order an employer to accommodate the handicapped complainant.

> 40. (2)Where the board of inquiry at the conclusion of the hearing finds that a right of a person under Part I has been infringed by discrimination because of handicap, the board may then proceed to inquire whether,
>
> (a) the person does not have access to premises, service, goods, facilities, or accommodation of the party who is found to be a contravener, because of handicap;
>
> or
>
> (b) the premises, service, goods, facilities or accommodation of the party who is found to be a contravener lack amenities that are

> appropriate to persons because of the handicap.
>
> and after making a finding thereon, the board may, unless the costs occasioned thereby would cause undue hardship and subject to the regulations, order that the party take such measures as will make such provision for access or amenities or as are set out in the order.
>
> (3) In addition to the powers conferred by subsection (2), where the board of inquiry at the conclusion of the hearing under subsection (1) finds that a right of person under Part I has been infringed by discrimination because of handicap, the board may then proceed to inquire and make a finding as to whether the equipment or essential duties attending the exercise of the right could be adapted to meet the needs of the person whose right is infringed and, after making a finding thereon, the board may, unless the costs occasioned thereby would cause undue hardship and subject to the regulations, order that the party take such measures to adapt the equipment or duties as will meet such needs and as are set out in the order.

Section 40 places a specific statutory obligation upon a respondent to reasonably accommodate a handicapped complainant once a finding of discrimination has been made. It is interesting to note that the standard imposed regarding cost of the accommodation is not phrased as being one of "unreasonable cost" but rather, "undue hardship", the term seen in American legislation. These subsections go to the powers of a board of inquiry to provide an effective remedy. Subsections 40(2) and (3) do not require the complainant to file a complaint that specifically seeks accommodation - the Board may on its own initiative make a finding and consequential order on the point.

These provisions of the new Code strengthen the argument that inherent to the meaning of the defence of "reasonable ... in the circumstances" provided for in paragraph 10(a) is the requirement that the respondent has an obligation to reasonably accommodate a complainant: (for example, in respect of religious beliefs or practices: see Rand, supra.) In section 16 of Bill 209, 1980, the standard was whether the complainant's handicap precluded performance of the essential duties "in the particular circumstances;" however, in the final version of the Code, as enacted, the reference to "in the particular circumstances" was dropped. This seems to have been appropriate because the aspect of reasonable accommodation for the handicapped is covered by the word "essential" in paragraph 16(1)(b) together with the remedies afforded by subsection 40 (2) and (3).

Finally, it is to be noted that subsections 40(2) and (3) use the term "undue hardship" rather than the term "reasonable ... in the circumstances" as seen in paragraph 10(a). The phrase"undue hardship" relates expressly to the "costs" of a reasonable accommodation. This language gives some support to the view that where costs, as meaning dollars, is the concern in considering the issue of reasonable accommodation, "undue hardship" is the most apt phrase, and perhaps more specific, and hence demanding, than the word "reasonable" which is, possibly, broader and more flexible. However, this is to dwell upon the general standard or test for reasonable accommodation inherent as an aspect to a consideration of a respondent's defence to a situation of constructive discrimination. What is clear with the coming into force of the new Code is that the express, legislated standard is "reasonable ... in the circumstances" for section 10 considerations, and for handicap complaints purposes paragraph 16(1)(b) coupled with subsections 40(2) and (3).

Subsection 4(1) of the new Code is more concise than subsection 4(1) of the old Code. The term "equal treatment" encompasses implicitly several forms of discrimination on prohibited grounds, for example, refusal to hire, refusal to refer,

refusal to recruit, discrimination in a condition of employment, refusal to promote, or maintenance of separate lines of progression.

Because section 10 is very express, it is not necessary to speculate on whether constructive discrimination would be covered by Part I otherwise, in the absence of section 10. However, bearing in mind that human rights legislation must be interpreted liberally, it might be argued that the term "right to equal treatment" in Part I includes the right to be free from constructive discrimination with an unreasonable refusal to accommodate. Discrimination need not be direct (section 8) and therefore, a general employment condition which may be intended to be neutral may "indirectly" result in 'unequal treatment'. Section 10 is, of course, very explicit regarding the issue of intent, and clearly, intent to discriminate is not a prerequisite to a finding of discrimination. Furthermore, the requirement that a respondent attempt, if reasonably possible, to accommodate a complainant flows very naturally from an interpretation of section 10.

The "reasonable and bona fide" clause is an exception to the general rule of section 10. Therefore, once a complaint makes out a prima facie case of discrimination because a seemingly neutral condition results in unequal treatment, the onus is upon the respondent to show that the condition was "reasonable and bona fide."

The Purpose Underlying The Code's Handicap Provisions As They Relate to Employment.

The preamble to the Code provides:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

> And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province...";

The objectives of the Code's handicap provisions as they relate to employment are several.

First, there is an objective of securing for the handicapped person equality of opportunity with respect to employment. Everyone deserves the same opportunity and chance to make the most of life, regardless of physical or mental handicap.

A corollary is to require an employer to make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of her true ability, and not based upon a stereotype or misconception about her handicap. Having a handicap means not being able to do one or more important things that most people can do. The law cannot make a person's handicap disappear, of course, but it does insist that every person receive a fair chance to show what she is able to do, taking into account her ability. The law now protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things she can do effectively and safely. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee or others, or the employer's property, be employed.

7. THE CASE LAW IN CANADA WITH RESPECT TO HUMAN RIGHTS LEGISLATION AND THE HANDICAPPED.

There is a dearth of jurisprudence in the area of law and the handicapped, given the very short period of time that physical and mental disability have been a part of anti-discrimination statutes. The decisions that have been rendered are not concerned so much with the definition and scope of the 'handicap' provisions in the human rights statutes, but with the bona fide occupational qualification and the issue of what adjustment or accommodation should be required of a respondent. An overview of the decisions, in particular with respect to discrimination in the context of employment, is in order.

One of the earliest decisions in this area was rendered, not by a tribunal under human rights legislation, but by the Railway Transport Committee of the Canadian Transport Commission in the case of Kelly v. VIA Rail, (1980) 1 C.H.R.R. D/97. Ms. Kelly was denied a railway ticket because she was confined to a wheelchair and planned to travel unattended. A VIA Rail Tariff specified that persons in wheelchairs had to be accompanied by an attendant. She made an application pursuant to section 281 of the Railway Act, R.S.C. 1970, c. R-2, on the ground that such refusal was contrary to the public interest. The only assistance which the applicant required was to be lifted on to the train on departure and off at arrival. The respondent argued that the cost of such assistance would be prohibitive and that existing train cars were ill-equipped to transport persons confined to wheelchairs.

The Committee decided for the applicant and found that the VIA Rail Tariff should be amended to allow self-reliant handicapped persons to travel alone. The respondent was ordered to provide boarding assistance in specified stations to assist unattended handicapped persons with their boarding at departure and arrival.

Decisions under the Canadian Human Rights Act.

In Foreman, Butterill and Wolfman v. VIA Rail Canada Inc., (1980) 1 C.H.R.R. D/111, three complainants were refused employment as waiters/waitresses on the basis that they failed to meet the visual standards for new employees. Each of the complainants was partially blind in one eye. They argued that they had been discriminated against on the prohibited ground of 'physical handicap'. The respondent argued, in defence, that the visual acuity was a bona fide occupational requirement. The Board of Inquiry found that, despite the lack of intention to discriminate, the respondent was in breach of the Canadian Human Rights Act because the required level of visual ability exceeded that necessary to successfully perform the task of a waiter/waitress.

In Parent v. Department of National Defence, (1980) 1 C.H.R.R. D/121, the complainant alleged that he had been dismissed and not considered for future employment because he was an epileptic: he was not considered for employment as a driver although he had previously performed all of the duties required of the job. The Tribunal found that the Complainant was not considered for employment because of his 'handicap', however found that the refusal did not constitute discrimination because the physical requirements were a bona fide occupational requirement. The complaint was dismissed.

In Foucault v. Canadian National, (1982) 3 C.H.R.R. D/148, a Tribunal found that the refusal by C.N. to employ the complainant as a bridgeman because of a previous back injury was not discriminatory. The complainant had undergone surgery for a discotomy. Evidence was adduced by the respondents which indicated the hazardous nature of the job, the high incidence of back injury among bridgemen, and the likelihood that a recurrence of the complainant's back injury could pose a safety hazard to other employees. The Tribunal found the refusal to hire was based on a bona fide occupational requirement and the complaint was dismissed.

In a decision released the same day as Foucault v. Canadian National, a Tribunal under the Canadian Human Rights Act found that a complainant was discriminated against by the Canadian National Express when he was refused a job as a warehouseman because he lacked the fingers and thumb on his right hand: Michael Ward v. Canadian National Express, (1982) 3 C.H.R.R. D/153. In this case, C.N. Express argued that the minimum standard for a warehouseman to safely perform the job was two digits on one hand as well as an intact hand. The Tribunal found that the evidence did not support the respondent's contention that two digits on the one hand was a bona fide occupational requirement. The Tribunal ordered C.N. Express to offer the complainant a summer position as a warehouseman.

In Anderson v. Atlantic Pilotage Authority, 3 C.H.R.R. (1982) D/193, a Tribunal found that the complainant was discriminated against when his employment as a launchmaster was terminated because his medical record revealed that he had suffered a heart attack seven years earlier. The Tribunal held that there was little risk that the complainant would suffer another heart attack and that the respondent did not establish that the absence of any previous record of heart attack was a bona fide occupational requirement. The complainant was awarded 500 dollars in general damages.

In a recent decision, Labelle and Claveau v. Air Canada, (1983) 4 C.H.R.R. D/266, a Tribunal found that the complainants were discriminated against when they were refused employment as pilots by Air Canada because of congenital malformations of the spine. The defects were not shown to affect their ability to perform the tasks of the position. The Tribunal ordered compensation to Labelle in the amount of 27,000 dollars for wages lost, and 2,000 dollars in compensation for damages to self-respect to each of the complainants.

Decisions in Other Canadian Provinces.

In a Saskatchewan case, The Occupational Health and Safety Branch (Saskatchewan Labour), and the Saskatchewan Mining Association v. The Voice of The Handicapped, Epilepsy Saskatoon, The United Steel Workers of America, Saskatchewan Association of Human Rights, and The Director of the Saskatchewan Human Rights Commission, (1980) 2 C.H.R.R. D/54, applications were made for exemptions from the Saskatchewan Human Rights Code prohibitions against discrimination on the basis of physical handicap. The exemptions were sought to enable pre-employment medical examinations to be administered to all prospective employees in the mining industry. Section 19 of the Saskatchewan Human Rights Code prohibits pre-employment inquiries regarding the nature or extent of physical disability and permits medical examinations only after a job offer has been made. Under the Code, if an examination reveals a disability which the employer can show precludes the required performance of the job, then the employer can retract the job offer. The Tribunal, in this case, allowed an exemption from the section 19 procedure so that medical inquiries could be made before an offer of employment, providing that applicants were not denied employment on the basis of physical disability except where a reasonable occupational requirement was shown.

In Re Saskatchewan Mining Association, (1983) 4 C.H.R.R. D/247, the Saskatchewan Human Rights Commission reviewed the exemption order dealing with pre-employment inquiries and revised the order so that medical inquiries can be made only after an offer of employment has been made in writing and only when a reasonable occupational requirement for the job in question had been identified.

In another Saskatchewan decision, Opportunity Handicap Ltd., v. Saskatchewan Co-ordinating Council on Social Planning et al., (1983) 4 C.H.R.R. D/245, the Saskatchewan Human Rights Commission refused to grant an exemption to the applicant

which would allow it to recruit and employ only disabled persons to sell light bulbs by means of telephone solicitation. The telephone script which employees recited identified them as handicapped persons and made it appear as if the solicitation was for charitable purposes. The Commission declined to grant the exemption and found that the telephone script itself amounted to discrimination because it constituted undignified exploitation of disabled persons. Further, the Commission found that a condition of employment which required that the employees provide medical certificates to establish that they were bona fide disabled persons was a violation of the Human Rights Code and served no positive or dignified purpose.

In a Manitoba decision, Berthelette v. City of Brandon, (1981) 2 C.H.R.R. D/382, the complainant was denied a job as a utility worker, which would require him to perform heavy manual labour under poor weather conditions, because he had undergone surgery for a back injury. The respondent argued that the complainant's back condition reasonably precluded him from satisfactorily performing the duties of the position. The board accepted the respondent's argument and found no violation of the Manitoba Human Rights Code.

In a more recent Manitoba decision, Mary Legge v. Princess Auto and Machinery Ltd., (1983) 4 C.H.R.R. D/271, a board of adjudication found that the complainant was not discriminated against because of her disability when her employment was terminated. The complainant suffered from asthma and was required to work on an addressograph machine in a partitioned off area of the company's warehouse. The board found no violation of the Manitoba Human Rights Code because the complainant decided the place was unsuitable without having visited the warehouse or attempting to perform the job after a cleaning of the working area had taken place to accommodate her. The complaint was, therefore, dismissed.

There are four recent decisions involving the employment of disabled persons in British Columbia. In David Andruchiw v. The Corporation of the District of Burnaby,

(1981) 3 C.H.R.R. D/663, the complainant applied for a position as a firefighter. He had been extremely athletic and held jobs requiring heavy manual labour in the past. In the application process he was denied employment because of a spinal defect detected by the examining physician. The Board found that the spinal condition would render the complainant a substantial risk and that good faith reliance on a medical opinion is enough to establish that no discrimination had occurred. The decision of the board of inquiry was appealed to the British Columbia Supreme Court, (1983) 4 C.H.R.R. D/240. Mr. Justice MacKay dismissed the appeal on the basis that the transcript revealed no error in law.

In a second British Columbia decision, Cook v. Noble, Prysianziuk, Ministry of Human Resources, and Tranquille Hospital, (1983) 4 C.H.R.R. D/298, the complainant was denied employment as a health care worker at a hospital for the mentally handicapped because he suffered from cerebral palsy. The respondent argued that the job entailed lifting of patients and that because of weakness in the complainant's left hand and leg he would be unable to perform the requirements of the job. The Board of Inquiry rejected the earlier test established in the case of Andruchiw v. The Corporation of Burnaby, supra, and accepted the test set out in the case of Ontario Human Rights Commission v. Etobicoke, (1982), 40 F.R. 159 (S.C.C.) which required that a bona fide occupational qualification clause have an objective relationship between the standards required and the performance of the job in question. Applying the Etobicoke test, the Board found there was an objective relationship between the requirement of use of the left hand and leg and the performance of the job of health care worker in the Tranquille Hospital. Therefore, the complaint was dismissed.

In a third British Columbia case, Matlock and Director, Human Rights Branch v. Canora Holdings Ltd., (1983) 4 C.H.R.R. D/302, a board of inquiry dismissed a complaint alleging discrimination on the basis of physical disability in employment. The complainant had a speech impediment and was refused employment as a filing clerk at

the respondent's business. The Board found that an important part of the job was the ability to perform effectively on the telephone and that this constituted a bona fide occupation requirement within section 8 of the British Columbia Human Rights Code. The Board found that the respondent was entitled to satisfy itself that the complainant could perform the telephone duties required for the position. The Board did not rule on the merits of the employment decision because the complainant had terminated the employment interview before a decision regarding her employment was made.

In a decision under the British Columbia Labour Code, in B.C. Timber Ltd. v. Pulp, Paper and Woodworkers of Canada, Local No. 4, (1983) 4 C.H.R.R. D/300, the Labour Arbitration Board considered whether the refusal to promote an employee who had suffered an injury on the job resulting in amputation of his right arm, constituted a violation of the Human Rights Code. The Human Rights Code was specifically incorporated into the Collective Agreement of the parties. The company argued that for safety reasons it did not promote the injured employee. The Board found that the company had discriminated against the employee because of his physical handicap, finding that it had failed to investigate the safety implications of the employees' injury to the extent necessary to establish a reasonable cause for discrimination.

8. THE UNITED STATES' ANTI-DISCRIMINATION LAWS WITH RESPECT TO THE HANDICAPPED.

Discrimination on the basis of handicap is prohibited in the United States by virtue of both federal and state legislation. The relevant federal statute is the Rehabilitation Act of 1973, 29 U.S.C. 88 701-94, as amended 92 Stat. 2982 (1978), and the regulations promulgated pursuant to that Act, 41 C.F.R., s. 60-741 (1977).

The basic coverage of this Act is set forth in section 504:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this Title, shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Subsection 706(6) defines a "handicapped individual" as meaning:

> any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.

In turn the Regulations issued under the Act define "physical or mental impairment" as:

> (a) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs, cardiovascular; reproductive; digestive; genito-urinary, hemic and lymphatic; skin, and endocrine or (b) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Under sections 503 and 504 of the Rehabilitation Act, discrimination in the context of employment is prohibited when practised by government contractors or sub-contractors with contracts in excess of $2,500.00; or generally when practised by

recipients of federal financial assistance. These sections are enforced primarily by the Department of Labour through the Office of Federal Contract Compliance.

Thirty-five American states have also added 'handicap' as a prohibited ground of discrimination in the context of employment. Of particular note here is the Washington Law Against Discrimination, Wash Rev Code ch. 49.60 (1979). The Washington protection is a general one and classifies discrimination on the basis of handicap as an unfair labour practice. The Washington State Human Rights Commission is charged with the duty of enforcing the statute. The Commission has adopted a broad definition of "handicap" for enforcement purposes:

> Men of common intelligence need not guess at the meaning of 'handicap' because it has a well defined usage measured by common practice and understanding. 'Handicap' commonly connotes a condition that prevents normal functioning in some way. A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental, or physical faculties. A 'handicap' is '... a disadvantage that makes achievement unusually difficult; esp. a physical disability that limits the capacity to work.' St. P. & Pac. R.R. v. Washington State Human Rights Comm'n 87 Wn. 2d 802, 557 P.2d 307, 310 (1976).

Federally, in developing a definition of handicap it has been held that only those impairments of a certain degree - which are likely to impact adversely on employment - are covered. Thus a running back for the Dallas Cowboys who is denied a position with the team because he cannot run the 100 yard dash in 10 seconds could not apply for relief under the Rehabilitation Act because his "impairment" is not a handicap for the purpose of the legislation. See, Office of Federal Contract Compliance Programs v. E. E. Black Ltd. Case No 77. OFCCP-7 at 12 (Sept 13, 1978).

The American experience has been to avoid unduly broad definitions of handicap which might result in frivolous and vexatious lawsuits. Although the Ontario Human Rights Code 1981 defines 'handicap' in a broad way, the Code allows for the dismissal of any complaint when it is found to be "trivial, frivolous, vexatious or made in bad faith", pursuant to paragraph 33 (1)(b).

American jurisprudence suggests that in making employment decisions, an employer should focus primarily on the employee's present ability to perform the job in question. Possible future inability to perform a job does not, in and of itself, justify the refusal to hire or promote a person now. See Clark v. Chicago, M., St. P. & Pac. R.R., 12 Fair Empl. Prac. Cas. 1102 (Wash. Super. Ct. October 3, 1975).

Safety considerations have been found to justify an employer's decision not to employ a handicapped person, however, such a decision should be based, as much as possible, on a medical judgment about the particular individual's condition. See, for example: Fraser Shipyards, Inc. v. Department of Indus., Labour and Human Relations 13 Empl. Prac. Dec. 11, 515 (Wis, Cir. Ct. Nov. 29, 1976).

The American courts and human rights tribunals have found it appropriate for a potential employer to request a medical examination to determine whether a prospective employee can perform the job in question. However, the courts have noted that a physician should make his or her recommendations based on the examination of an individual and not merely on speculation as to how the individual will react under particular conditions. In making his or her recommendation, the physician should be knowledgeable about the specific job requirements involved. See, for example, Wash. Ad. Code, 162-22-090 (1979) which sets out detailed instructions as to a physician's opinions in evaluating the ability of an individual to perform the job in question.

Very few American cases have addressed the concept of "reasonable accommodation". In Holland v. Boeing Co. 583 P.2d 621 the Washington Supreme Court held that employers must take affirmative steps to accommodate an individual's

handicap, including incurring some additional costs. The boundaries of how far an employer must go in terms of accommodation is not clear, however, regard will be had to both the cost and whether or not there is an available alternative.

The Supreme Court of the United States rendered its first decision involving discrimination because of handicap in Southeastern Community College v. Davis 442 U.S. 397 (1979). The Court held that under section 504 of the Rehabilitation Act of 1973, the College could take into consideration an applicant's hearing impediment in determining whether the applicant was "otherwise qualified" for admission into its clinical nursing program. Mr. Justice Powell, writing for a unanimous Court, held:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modification in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participating in a federally funded program 'solely by reason of his handicap'. (at 405).

In essence, then, the Supreme Court viewed the protection against discrimination on the basis of handicap in employment as requiring employers not to erect arbitrary barriers which would prevent a handicapped person from performing a job. The law requires employers to look beyond any preconceived stereotypes of handicapped individuals as to what they can or cannot do.

Handicapped individuals in the United States have also been afforded relief under the due process and equal protection clauses of the fourteenth amendment to the Constitution. For example, in 1977 the Third Circuit Court of Appeals upheld the discrimination allegations of Judith Gurmankin, a blind English teacher, upon a denial of due process because she had been prevented from taking a teacher's exam by virtue of her handicap and subsequently denied a teaching position: Gurmankin v. Costanzo 556 F,

2d 184 (2d Cir. 1977). Lee Miller, in "Hiring the Handicapped: An Analysis of Law Prohibiting Discrimination Against the Handicapped in Employment" (1980) 16 Gonzaga Law Review 23, summarizes the intent behind legislative prohibitions on discrimination because of handicap as follows:

> The Rehabilitation Act of 1973 and the Washington Law Against Discrimination guarantee the handicapped the right to be treated in a nondiscriminatory manner. The basic requirement of these statutes is the removal of artificial barriers to employment of the handicapped. Contrary to criticism leveled against them, these laws do not mandate preferential treatment of the handicapped. The ultimate goal of these statutes is to protect the handicapped by requiring that employers provide the opportunity for an individual to succeed or fail on his or her own merits. That is the focus of the three-pronged analysis suggested in this Article. This approach recognizes both the rights of the handicapped to equal employment and the right of employers to expect an efficient and productive work force.

As well, see generally, Timothy Cook, "Nondiscrimination in Employment under the Rehabilitation Act of 1973", (1977) 27 The American University Law Review 31; R. B. Jacobs, "Some New Teeth for a Paper Tiger: The Rehabilitation Act of 1973" (1980) 23 Howard Law Journal 481; Sy DuBow, "Employment Discrimination: Challenging Barriers to Disabled Americans", Trial, December 1983, at pp. 39-43; and Accommodating the Spectrum of Individual Abilities, United States Commission on Civil Rights, Clearinghouse Publication 81, Sept., 1983, which focuses upon the issue of reasonable accommodation due to its central importance to handicap discrimination law.

9. THE EVIDENCE.

The Complainant, Cindy Cameron, is an attractive, pleasant young woman, age 19. Ms. Cameron was born with a defective left upper extremity, this deformity being referred to medically as "congenital syndactyl." Over the years, she has had multiple operations at the Hospital for Sick Children, Toronto, in respect of her left hand. Ms. Cameron had some other problems arising at birth in respect of other than her left hand, but these have been corrected surgically, and her left hand constitutes the only residual "handicap". The thumb and little finger are quite normal, but the index, middle and ring fingers are considerably shorter than those of a normal hand. These three fingers were partially fused at birth, but this was surgically corrected through operations at Toronto's Hospital for Sick Children when she was nine or ten years old (Transcript, Vol. 2, at p. 18). Quite clearly, Cindy Cameron has a "handicap" within the meaning of subparagraph 9(b)(i) of the Code which reads:

> (b) "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,
>
> ...

It is quite obvious from all of the evidence that Cindy Cameron is indeed a truly remarkable person. Notwithstanding the psychological trauma of having this handicap, Ms. Cameron does, indeed, have a very positive outlook on life and continues to strive for

an independent, productive mode of life, refusing to seek sympathy or feel sorry for herself. She accepts whatever limitation she might have, and strives to live a full life through realizing the full potential of her capabilities.

It is also quite obvious that Ms. Cameron has been blessed with strong and loving parents, who have coped with both Cindy's problems in growing up, and with the problems they themselves undoubtedly have faced in coming to terms with having a handicapped child. It is apparent that Ms. Cameron and her family are quite ordinary people (using that term not in any pejorative manner, but rather in its proper sense), but because of Cindy's visible, physical defect, must endure the strain of the reactions of otherwise ordinary people who are afraid and shirking in coming into contact with such an abnormality. The paradox is that it is the reaction of the supposedly normal person to the handicapped person that really creates the abnormal relationship between the two persons. The physical abnormality can be insignificant (as with Ms. Cameron's), yet the reaction to it by others (the supposedly 'normal') can create a very abnormal relationship as between the handicapped person and her or his social enviornment. The United States Civil Rights Commission, in its report, Accommodating the Spectrum of Individual Abilities, September 1983, Clearinghouse Publication 81, observed of this tendency:

> Attitudes toward disabilities are often negative because we fear disabilities, we don't understand them, and we feel uncomfortable in situations where we experience fear and uncertainty. Yet these problems can be overcome. Fear can be allayed by offering information that makes disabilities comprehensible, and uncertainties can be reduced by helping people understand what they should and should not do when they are with disabled individuals. (at page 43).

In contrast, the 'handicapped' person, like Ms. Cameron, acutely sensitive to the feelings and frailties of others, is much more accepting than the 'normal' person of any abnormality (whether physical or otherwise) as being within the quite 'normal' experience of people.

Finally, it must be mentioned that Ms. Cameron has had the benefit of understanding and supportive teachers, and extraordinary physicians who have not only shown exemplary skill in meeting her physiological needs, but have provided understanding and support with respect to her psychological needs.

In October, 1982, Ms. Cameron, then 17, was seeking her first job since leaving high school. On October 1, she went to the Nel-Gor Castle Nursing Home, in Newcastle, Ontario, to seek a position as a nurse's aide, filling out an Application for Employment form (Exhibit # 3a).

Ms. Cameron is 5 feet 4 inches tall, weighs 145 lbs., and in good health. She regards the limitation with respect to physical function because of her defective left hand as being very minimal so far as prospective employment is concerned. She stated that the one limitation that she could imagine was that she could not be "a professional piano player"[1], but she has no difficulty performing day to day activities, or in respect of other employment she had while a student. (Transcript, Vol. 2, pp. 15-19). While at high school she had worked as a kindergarten teacher's aide for one year, and at the Oshawa

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1 One must guard carefully against preconceptions about the limitations arising from a handicap. This comment by Ms. Cameron reminded me of the story of 'Three-Finger Brown', a very famous baseball player.

> "... (T)he Chicago Cubs ... (had) Mordecai Peter Centennial (Three-Finger) Brown - his parents threw in the extra middle name because he was born in 1876. A farm boy from Indiana, Brown joined the Cubs in 1904 and won 20 or more games every season from 1906 through 1911. As a youngster he had an accident with some farm equipment, which necessitated the amputation of most of the index finger on his right hand (his throwing hand). The same accident also rendered the little finger of that hand useless. Nevertheless, his pitching hardly suffered; indeed, he always claimed the injury gave his sinker ball that extra something no one else could duplicate. In crucial Cubs-Giants games it was invariable Three-Finger Brown vs. Christy Mathewson on the mound - and 13 our of 24 times the decision went to Brown." (The Unforgettable Season, G. H. Fleming, Holt, Rinehart and Winston, New York, 1981, at p. viii).

Maplewood Centre some 220 hours for a high school credit, caring for mentally and physically handicapped children. She had also been a helper for a wolf cub pack and had worked at the Brownsdale Community Centre as a caretaker. She was held in high regard by her employer in these situations, as related by her teacher, Eva Nichols, the Co-ordinator of Co-Operative Education at Clarke High School. Ms. Cameron completed high school in the fall of 1982, and started an Early Childhood Education program at Sir Sandford Fleming Community College in Peterborough, but left to seek employment.

The Respondent, Nel-Gor Castle Nursing Home[1] had advertised September 21,

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1

The Respondent described as "Nel-Gor Castle Nursing Home" is, in fact, an unnamed corporate entity which carries on business as "Nel-Gor Castle Nursing Home". I enquired of counsel toward the end of the hearing (Transcript, Vol. VI, pp. 5-9; 103-106; 182) as to whether the Respondent was properly described by the simple reference "Nel-Gor Castle Nursing Home", and was told that counsel for the Commission was in agreement that the corporate entity need not be named as a party, given the personal undertaking by counsel for the Respondents that should there be any award against the Respondents, he would see that the award was paid. When I persisted in suggesting that a corporate entity should be properly named as a party, counsel suggested that it was suffice to bring a proceeding against the business name, citing Rule 110 of the Supreme Court of Ontario Rules of Practice and Procedure, and S. Reichman & Sons Ltd & Co. v. The Ambassador; Bank of Montreal, Garnishee, (1967) 1 D.L.R. 440. I remain very skeptical as to whether it is suffice to simply name a respondent by way of the firm name, rather than the proper corporate name, but given the undertaking by Respondents' counsel coupled with the agreement of Commission counsel that such undertaking was suffice in the instant situation, against my better judgment I did not add the corporate entity as a named party on my own initiative.

However, this approach should not be followed as a general practice in human rights cases. Apart from the legal ramifications to perhaps not having a properly named respondent, the full and proper names of respondents, and complainants, should be used, on general public policy grounds. The public has an interest in human rights cases, and has the right to know who the parties are to such proceedings. As to the adding of respondent parties, see generally Bhajat Tabar and Chong Man Lee v. David Scott and West End Construction Limited (1982) 3 C.H.R.R. D/1073 at D/1074, D/1075 (Ontario Board of Inquiry Interim Decision).

1982, in the Oshawa Times, a local newspaper, for health care aides (Exhibit # 11) and Ms. Cameron, learning of the advertisement through a friend, approached Nel-Gor on October 1, 1982, and completed an application form (Exhibit # 3a), with a view to obtaining the position of aide.

Mrs. Marvis Solimano, the then Assistant Administrator at the Nel-Gor Castle Nursing Home, interviewed Ms. Cameron for about ten minutes on October 1 at the nursing home, and after observing and talking with Ms. Cameron, and reviewing her experience, was quite favourably impressed.

Mrs. Solimano testified that Ms. Cameron impressed her at the interview as having "a caring disposition". The Respondents' nursing home would not be a pleasant place to work for many people, but this is not meant to be critical of the Respondents' nursing home. The evidence suggested that the Respondents seek to take good care of their patients and provide them with a happy environment. The Nel-Gor Castle Nursing Home has 88 beds and is usually close to being full. But any nursing home with elderly patients has a number who are incontinent, who are simply ornery, and some who are obstreperous or even violent on occasion toward those caring for them. There are many unpleasant, occasionally even frightening, tasks for a nurse's aide. Mrs. Solimano noted that Ms. Cameron was not bothered at all by the patients she saw in the lobby when she came for her interview October 1. Mrs. Solimano found Ms. Cameron to be an "ideal" applicant from the standpoint of her personal qualities and experience. Mrs. Solimano indicated to Ms. Cameron that there was an excellent chance she would be hired as a nurse's aide. Ms. Cameron testified that Mrs. Solimano left Ms. Cameron with the impression that "as soon as an opening came up, that she would call me." (Transcript, Vol. 2., p. 30). Mrs. Solimano had not noticed Ms. Cameron's handicap in this interview, and Ms. Cameron, considering that her handicap was irrelevant, did not mention it to Mrs. Solimano. It is quite clear from all the evidence that Mrs. Solimano considered Ms.

Cameron to be an excellent prospect for the nurse's aide position, and that Ms. Cameron would accept the job upon it being offered to her.

Ms. Cameron was given a "pre-employment medical examination" form (Exhibit # 4) to be completed by her family physician, Dr. James Cunningham, of Bowmanville. This was completed shortly before October 8, by Ms. Cameron attending at Dr. Cunningham's office. Mrs. Solimano had telephoned the Cameron house, October 7, speaking with Cindy's sister, Kimberly, and telling her that, subject to a satisfactory medical form, Cindy could start to work as a nurse's aide October 25. Ms. Cameron called Mrs. Solimano back, confirming that she wanted the job.

Ms. Cameron returned to the Respondents' premises October 8, 1982. As the medical form (Exhibit # 4), refers explicitly to the congenital defect in respect of Ms. Cameron's left hand, Mrs. Solimano noted this and asked Ms. Cameron to show her left hand to her, which she did. Mrs. Solimano asked Ms. Cameron if she had any problems in lifting and Ms. Cameron related her previous experience in lifting, and replied that she was able to lift without any problems (Transcript, Vol. 2, pp. 35-38).

The medical evaluation of Dr. Cunningham was very favourable to Ms. Cameron, including in respect of her left hand, stating that while the hand was deformed there was "no impaired function" and concluded generally that:

> "On the basis of history and examination I find Cindy Cameron is free from any ailment, disease or defect that might diminish ability to such a degree as to prevent the safe performance of her duties as: nurse's aid (sic) with special attention to being able to lift patients." (Exhibit # 4, with the underlined portion being written in by the physician, and the remaining portion being part of the printed type of the form).

Dr. Cunningham has attended upon Cindy Cameron since shortly after her birth, so that he knows her very well. He has also been in the Respondents nursing home to visit patients. Dr. Cunningham impressed me as a capable, conscientious physician who was doing his best to give an objective opinion about Cindy's capabilities. His testimony confirmed what he expressed in a "to whom it may concern" letter shortly after October 8, 1982:

> "The functional condition of her hand is excellent despite several operations. I am of the opinion that the deformity in no way hampers her activities in a nursing home setting." (Exhibit # 5)

Dr. Cunningham had visited the Respondents' nursing home on occasion over the years to visit patients, and he knew that an aspect of an aide's job was to lift bedridden patients. This job requirement was also clear from the medical evaluation form (Exhibit # 4, quoted supra). He was asked to review Exhibit # 13 (which sets forth Nel-Gor's list of job functions and duties in respect of nurses' aides) while testifying and stated that, in his opinion, Ms. Cameron could perform all the tasks listed therein. (Transcript, Vol. 3, p. 13, 14). Dr. Cunningham also referred to Ms. Cameron in his testimony as an outgoing, well-adjusted, happy young girl with no particular emotional problems. Dr. Cunningham was never contacted by Nel-Gor in respect of the medical form he had completed for Ms. Cameron. (Transcript, Vol. 3, p. 15).

It is clear from the evidence that Mrs. Solimano was prepared to hire Ms. Cameron. (Transcript, Vol. 2, p. 189).

While Mrs. Solimano and Ms. Cameron were talking, the Respondent, Marlene Nelson, entered the room and was introduced to Ms. Cameron by Mrs. Solimano. Mrs. Nelson is the Administrator of the nursing home, and an owner of shares in the entity

that carries on the nursing home business. She made the final decision in the hiring of staff for the nursing home. Mrs. Nelson looked at the medical form and asked Ms. Cameron if she could look at Ms. Cameron's left hand, which was done. Mrs. Nelson then expressed the opinion that she did not think Ms. Cameron could cope with the "gripping" or clasping required for lifting patients, because of her handicap. (Transcript, Vol. 2, pp. 168-172).

Mrs. Nelson asked another lady, Mrs. Olga Brown, the Nursing Director at Nel-Gor to come and look at Ms. Cameron's hand and Mrs. Brown also expressed the opinion that Ms. Cameron might not be able to grasp and lift patients satisfactorily.

Mrs. Nelson then told Ms. Cameron she would not be hired. "Well, I am very sorry but I really don't think you could do the job. We could not take a chance on a resident being dropped. It is something we just can't do." (Transcript, Vol. 2, p. 171).

It is clear that Ms. Cameron at all times expressed her own view to Mrs. Nelson, Mrs. Brown, and Mrs. Solimano that she could grasp and lift patients satisfactorily and that her left hand was not a handicap in any way in terms of the demands of the nurse's aide position. (Transcript, Vol. 3, p. 113; Vol. 5, pp. 32, 33). Ms. Cameron had lifted frequently, on her own, handicapped children when she had worked at the Maplewood Centre, and as a babysitter. (Transcript, Vol. 2, pp. 14, 16-18, 63). Her previous jobs had required her to grip, lift, and carry, and she did not have any problems.

Mrs. Nelson and Mrs. Brown, both Registered Nurses, testified that there is considerable lifting of patients by nurses' aides at the nursing home, and they were concerned that elderly patients would be placed at greater risk if Cindy Cameron was to be hired as a nurse's aide. They were concerned about Ms. Cameron's ability to grasp in terms of being able to lift patients. The "fireman's lift" is sometime's employed in this lifting, which require's that one nurse's aide clasp her right hand to the left wrist of another aide, and her left hand to the right wrist of the other aide, and vice-versa. Some people also cross arms in doing the fireman's lift.

It is clear that there is some lifting of patients required at the nursing home, although the evidence was disputed as to how extensive and how difficult this was. The fact of lifting is stressed in the medical examination form (Exhibit #4) where it says "with special attention to being able to lift patients", and it was stressed in the initial interview between Ms. Cameron and Mrs. Solimano, and in the subsequent discussion between Mrs. Nelson, Mrs. Brown and Ms. Cameron. The concern about "lifting" for most nurse's aide applicants was directed at whether or not they had any back problems. With respect to Ms. Cameron, the concern was as to whether she could adequately grasp and lift because of the defect in respect of her left hand, without patients being put to greater risk than if they were lifted by another aide with normal hands. It is clear that at least one patient was totally incapacitated and unable to lift herself at all, and that at least a few others needed some lifting (Transcript, Vol. 2, pp. 138-139).

Mrs. Nelson and Mrs. Brown testified that there are a number of psychiatric and retarded, as well as simply geriatric, patients at the Respondents' nursing home, which can sometimes make 'lifting' particularly difficult. A patient may become erratic on occasion, without warning. Mrs. Nelson testified that in October, 1982, perhaps 65 of the total of 88 patients might fall into the ex-psychiatric category. There have been approximately 14 "incidents", where patients became obstroperous when lifting was involved, out of a total of some 69 "incidents" over the past three years (Exhibit # 18). However, it is clear from the totality of Mrs. Nelson's evidence that her concern about Ms. Cameron was in respect of her general ability to lift patients, and the presence of psychiatric patients was not really of special significance.

In rejecting Ms. Cameron for employment as a nurse's aide, Mrs. Nelson was quite polite. It is clear from the evidence, and I so find, that she had an honestly held concern that Cindy's handicap would interfere with her ability to grasp and lift patients and hence, place the patients in greater jeopardy. Mrs. Nelson also suggested to Cindy that she might be able to offer her another position that did not require lifting, at a later

point in time, perhaps in administering crafts and activities to the patients, and this was noted by Mrs. Nelson at the bottom of the Application for Employment (Exhibit # 3).

However, neither Mrs. Nelson nor Mrs. Brown asked Ms. Cameron to demonstrate her grasp in a simulated lifting situation, which would have been done easily in the circumstances. For example, Mrs. Solimano could have pretended she was a bedridden patient, with Mrs. Nelson and Mrs. Brown taking turns with Ms. Cameron to do a 'fireman's lift' in respect of the patient. Mrs. Nelson said she did not ask Ms. Cameron to lift someone because she did not think Ms. Cameron could lift patients. (Transcript, Vol. 5, pp. 34,35). Mrs. Nelson's only reason for rejecting Ms. Cameron for employment as a nurse's aide was because of her handicap, which Mrs. Nelson believed would hinder her job performance, by her being unable to lift patients as well as a nurse's aide who was not handicapped, and by thereby putting patients at greater risk of injury. (Transcript, Vol. 3, pp. 127-129).

Moreover, Mrs. Nelson did not call Dr. Cunningham, or any of Ms. Cameron's references, to discuss Ms. Cameron's 'handicap' and the medical form (Exhibit # 4) Dr. Cummingham had completed. (Transcript, Vol. 5, pp. 33-34).

Ms. Cameron left the nursing home shocked, very upset and in tears, and this was confirmed by her younger sister, Kimberly, and her father, George Cameron. She had been told by her parents, sibblings, teachers, doctors and friends that she could do virtually whatever she wanted to do, and that her left hand would not inhibit her achieving this. Her sense of self-worth and self-confidence was shakened, and she felt "put down because of something I could not help." (Transcript, Vol. 2, p. 47). She suffered moods of depression and became withdrawn. Ms. Cameron decided in November to return to school and did so about February 1, 1983, for a few weeks, then leaving to take a job with a Becker's store, where she stayed for many months. Just prior to this hearing, she obtained a position as homemaker with the Red Cross in Oshawa, looking after elderly people and children.

Mrs. Eva Nichols, a former teacher of Ms. Cameron, testified that Ms. Cameron was a good-natured, shy, quiet student, who is quite sensitive toward, and relates very well to, other people. Mrs. Nichols said that Ms. Cameron had received excellent reports in her field work, in the Co-Operative Education component of her studies at Clarke High School, especially from the Maplewood Centre. Ms. Cameron completed 220 hours in that institution and received her "excellent" evaluation in the context of being evaluated in the same manner as regular employees. Other students had been terminated on occasion by Maplewood for incompetence. Ms. Cameron's work at Maplewood was quite similar to that in a nursing home. In a letter of reference (Exhibit # 7) Mrs. Nichols states:

> "During that time, her hand was of no handicap whatsoever. In fact Cindy's behaviour made us unaware of its existence ... Cindy experienced no difficulties at all."

Mrs. Thelma Davis, a professional occupational therapist with Community Occupational Therapy Associates, testified. Mrs. Davis has had some 16 years of experience in occupational therapy, including several years with the Ontario Worker's Compensation Board. This included three and one-half years in the Board's "hand clinic" under the direction of Dr. James Murray, a plastic surgeon. Mrs. Davis also taught "lifting techniques" at the Workmen's Compensation Board. She was asked by the Attorney General's Department to do an analysis with respect to Ms. Cameron's ability to perform the tasks of a nurse's aide. Mrs. Davis did a very competent and thorough "Job Demands/Job Performance Analysis" (Exhibit # 17).

Mrs. Davis went to a nursing home, Villa Columbo Nursing Home, in Toronto. She prepared a description of each activity to be performed, and then went through simulation exercises, with another therapist assuming the role of patient, whereby Ms.

Cameron would perform every activity, including the 'fireman's lift', and found that Ms. Cameron could perform every physical task. Mrs. Davis also visited a number of other nursing homes, and familiarized herself with the nurse's aide duties as set forth by the Respondent. (Exhibits # 13 and # 16).

Mrs. Davis also used scientific measuring instruments to determine Ms. Cameron's 'grips' and 'pinch strength' capabilities.

Mrs. Davis concluded in her report (Exhibit # 17) that:

> Performance and Observations
>
> Ms. Cameron performed each task, as described to her, in a very co-operative and competent manner. Expertise of technique was obviously missing, but physically, she was able to perform every task without exception.
>
> All fingering activities were performed primarily by her dominant right hand, although where bilateral activity was involved, ie. both hands working together, this did not present a problem.
>
> Handling activities presented no difficulties.
>
> Lifting and carrying, which was considered mainly to consist of two methods of performing a fireman's lift for evacuation purposes, presented no difficulties.
>
> Gripping consisted primarily of right handed activities and presented no difficulty to the client.
>
> Her grip strength was recorded on a Jamar dynamometer and her pinch strength was recorded on a pinch gauge. The results are noted below.
>
> These findings would indicate a grip strength in the left hand of approximately 65% with respect to established norms in a subdominant hand.
>
> Pinch strength was entirely compatible with and in some instances greater than that of the dominant right hand.

Jamar Readings	Left	Right (dominant)
10.7 kg.	21.4 kg.	
Pinch Strengths		
Thumb/Index Finger	2.7 kg.	2.6 kg.
Thumb/Long Finger	2.2 kg.	3.5 kg.
Thumb/Ring Finger	2.3 kg.	2.3 kg.
Thumb/Little Finger	4.4 kg.	2.3 kg.
Key (i.e. thumb/side of index finger)	6.8 kg.	6.4 kg.
Tripod (i.e. thumb/index plus long fingers)	N/A	4.5 kg.

Conclusion

It is my opinion that Ms. Cameron is physically capable of performing all the tasks as stated in the job description, required of a nurse's aide. Her disability did not appear to affect her level of functioning in any way.

Mrs. Davis commented in her testimony upon the jamar dynometer readings which showed the left hand of Ms. Cameron to have only about one-half of the reading in respect of her right hand. This instrument measures a "fine" (as compared to "gross") cylindrical grip. The first point is that the grip of any person's subdominant hand (the left in Ms. Cameron's case, as generally with right-handed people) is less than that of the dominant hand. Second, the structural nature of the instrument simply made it difficult to accurately measure Ms. Cameron's grip in her left hand, due to the short length of her index, long, and ring fingers. Third, Ms. Cameron's 'pinch strength' in her left hand is, Mrs. Davis testified, stronger than with most other people. Finally, a "fine" cylindrical grip by the left hand is not, Mrs. Davis testified, necessary to the nurse's aide's job. That is, the thrust of Mrs. Davis' evaluation is that Ms. Cameron's problem is that she is missing length to three fingers of her left hand but such length is not necessary to performing the job of nurse's aide (as opposed perhaps, for example, to being a professional piano player, which Ms. Cameron felt she could not be, given her 'handicap').

Mrs. Davis had been provided with the written descriptions of a nurse's aide's duties at Nel-Gor, (Exhibits # 13 and 16) and had personally attended "quite a large variety" of nursing homes over the years, visiting some as frequently as twice a week over the past three or four years, and had once worked for a year in a geriatric hospital in Scotland. (Transcript, Vol. 3, pp. 33, 34, 60, 61, and 78). Mrs. Davis was very familiar with lifting techniques and had Ms. Cameron perform the 'fireman's lift' in the simulation exercises, which Ms. Cameron was able to do quite satisfactorily. In general, Mrs. Davis found Ms. Cameron's left hand to be "very functional". (Transcript, Vol. 3, pp. 80, 81).

Mrs. Davis' analysis was objective and thorough, and her conclusion that Ms. Cameron could function with her left hand as well as any other nurse's aide, (Transcript, Vol. 3, pp. 58, 59; Exhibit # 17) well-founded, given her analysis.

Dr. Hugh G. Thompson, FRCS, testified. He is a specialist in plastic surgery with the Hospital for Sick Children, and congenital hand surgery is his particular interest. Dr. Thompson has been Ms. Cameron's physician since 1964. He knows his patient well, and had reviewed the description of the duties of a nurse's aide (Exhibit # 13 and # 16), as well as the report (Exhibit # 17) of Mrs. Thelma Davis, before testifying. In Dr. Thompson's opinion, there was nothing in the way of the duties of a nurse's aide, as described in Exhibit # 13 and # 16, that Ms. Cameron could not do. In particular, he thought she would have no difficulty with the 'fireman's lift' and, in fact, might do better than the average female, because Ms. Cameron is strong and reasonably sized, and has as much or more strength in her left hand as in her right hand. The spread of her left hand is greater than her right hand, and the 'pinch strength' of the left hand as between the thumb and little finger, is almost twice that of the right hand.

Dr. Thompson expressly concurred with Mrs. Davis' conclusion, saying that Ms. Cameron can "compete at an equal level with any of her peers" as a nurse's aide. (Transcript, Vol. 4, pp. 3-5, 7-17, 26, 37, 38; Exhibit # 6). He also felt Ms. Cameron's understanding of her 'handicap' is better than most persons in a similar position.

The Complainant testified that she expected, from what Mrs. Solimano told her October 1 and 8, that as a part-time nurse's aide she would work six eight hour shifts every two weeks, at $5.71/hr., but Mrs. Nelson later testified that she thought a part-time nurse's aide might work up to a maximum of six shifts every two weeks, but would probably average only four shifts every two weeks. However, on cross-examination, Mrs. Nelson candidly stated that Mrs. Solimano would have a better knowledge of the precise numbers of shifts being worked at the time in question. (Transcript, Vol. 5, pp. 47-49).

10. SUMMARY OF FINDINGS WITH RESPECT TO THE EVIDENCE.

The central items of evidence in this hearing were not really in dispute. The Complainant, Ms. Cindy Cameron, sought employment as a nurse's aide in the Respondents' nursing home, and she would have been hired but for the belief by Mrs. Nelson that Ms. Cameron's handicap restricted her ability to lift patients and thus, would put patients at greater risk. The judgment of Mrs. Nelson in this regard was honestly made, without malice toward Ms. Cameron. However, this judgment was made without any real weight given to Ms. Cameron's own opinion, or to her family physician, Dr. James Cunningham's opinion, that her handicap did not restrict her in any manner, without any contact with the references named in Ms. Cameron's application for employment, and most significantly, without any attempt to put the judgment to the test of an exercise simulating the lifting of a patient, by having Ms. Cameron do a 'fireman's lift' with someone else. Mrs. Nelson was certain, given her simple observation of Ms. Cameron's hand and based upon her experience as to what was required of a nurse's aide, that Ms. Cameron was incapable of performing or fulfilling an essential duty or requirement of the nurse's aide position because of the handicap. This opinion was bolstered by Olga Brown, another very experienced nurse at the Nel-Gor Castle Nursing

Home. However, Mrs. Nelson's judgment could quite easily have been put to the test of having Ms. Cameron, together with Mrs. Nelson lift either Mrs. Solimano or Mrs. Brown as a 'make-believe' patient. This could have been done at no cost and with but a few minutes of everyone's time.

11. APPLICATION OF THE LAW TO THE EVIDENCE.

A. What Constitutes a Prima Facie Case That There Has Been A Breach of Part I of the Code?

The onus is upon the Commission and the Complainant to establish a prima facie case of discrimination in contravention of subsection 4(1) and section 8 of the Code.

The Complainant, Cindy Cameron, is entitled to equal treatment with respect to employment without discrimination because of her handicap. The word "discrimination" implies a comparison. The applicant for employment is worse off, by not getting the position of employment, than she would have been if there had been no discrimination against her. More specifically, she is worse off than someone else in a comparable position against whom there has been no discrimination. Post Office v. Crouch (1974) 1 All E. R. 229 per Lord Reid at 238. "Discrimination" in the context of subsection 4(1) of the Code means the act of making a distrinction against, or in favour of, a person based upon the group, class or category ("race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap") to which that person belongs, rather than on individual merit. Courtner v. The National Cash Registry Co., 262, N. E. 2d. 586 (1970) per Burton, J.

Discrimination in respect of employment on a ground prohibited by subsection 4(1) singles out the victim for treatment on the basis of that factor. Ms. Cameron's application for employment must be considered on the merits, not on the basis of a

factor prohibited by the Code. There is no dispute on the evidence that Ms. Cameron would have been hired as a nurse's aide at Nel-Gor, but for the fact of her handicap, and that the Respondent, Mrs. Nelson, denied her employment solely because of such handicap.

Cindy Cameron has a "handicap" within the meaning of sub-paragraph 9(b)(i), she applied for a position of employment at Nel-Gor, which position was available at the time, she was not hired for the position, and the only reason she was not hired was "because of (her) handicap" as defined by paragraph 9(b).

Prima facie, there is a breach of subsection 4(1). Prima facie, Ms. Cameron has been denied her right to equal treatment without discrimination, because of her handicap. Prima facie, the Respondent Mrs. Nelson, in contravention of section 8, has done directly an act that infringes a right protected under Part I of the Code.

The Respondent, Mrs. Nelson, believed that Ms. Cameron would not be able to lift patients, or at least lift patients without exposing them to greater risk than otherwise, because of her handicap. There was no malice, hatred or ill-will on the part of Mrs. Nelson. She was acting with subjective good faith, that is, she honestly believed that Ms. Cameron's handicap rendered her less capable than a person without such a handicap in performing the essential duties of a nurse's aide.

Respondents argue that the absence of "malice" means there can not be a breach of the Code, but I disagree. The employer's subjective good faith is not relevant to the initial determination of whether or not there is a prima facie breach of Part I of the Code. It is enough to constitute a prima facie breach if the employer intends to "infringe or do, directly or indirectly, anything that infringes a right" under Part I. 'Intention' must be separated from 'motive' which goes to the reason for doing the intended act. See Ontario Human Rights Commission et al. v. The Borough of Etobicoke (1982) 3 C.H.R.R. D 781 at D 783; Rand v. Sealy Eastern Limited, (1982) 3 C.H.R.R. D 938 at D 953. Clearly, Mrs. Nelson intended her act of discrimination toward Ms. Cameron. Clearly, her motive was benign in that she did not think Ms. Cameron would be able to perform her duties as an employee satisfactorily.

It is common, of course, for the law to distinguish between 'intention' and 'motive'. For example, this distinction is made in tort law.

Salmond and Houston, (1981) Sweet and Maxwell, at p. 17 states:

> "Save in such exceptional cases malice in the sense of improper motive is entirely irrelevant in the law of torts. The law in general asks merely what the defendant has done, not why he did it."

Fleming, The Law of Torts, 6th edition (1983) at p. 24, states:

> "Battery is an intentional wrong: the offensive contact must have been intended or known to be substantially certain to result."

The C.E.D. (Torts) states:

> "An evil motive is not an element in torts other than in exceptional situations (malicious prosecution, injurious falsehood, and conspiracy)."

My interpretation of the Code to the effect that 'malice' is not a required element to discrimination under Part I of the Code is reinforced by the fact that section 10 expressly states that were there is merely constructive discrimination a right of a person under Part I is infringed, other than in exceptional circumstances. That is, section 10 does not even require 'intent', let alone 'malice' (as discussed, supra).

Moreoever, section 40 of the Code provides for remedial orders of a board of inquiry where there is a finding that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding. This section provides that a direction can be made by the board to achieve compliance and restitution (including monetary compensation) and in addition, if the

infringement has been engaged in willfully or recklessly, the board may award up to $10,000.00 for mental anguish. It is clear that this provision implies that there can be a breach of the Code even where the infringement is not willful or reckless. "Willfully" connotes mere intent and sometimes more than mere 'intent' to do an act, but does not necessarily embrace any notion of 'malice'.

The World Book Dictionary, 1979 edition, vol. 2, Doubleday & Company Inc., at pp. 2392, 2393, defines "willfully":

> "adv. 1. by choice; voluntarily.
> 2. by design; intentionally.
> 3. selfishly; perversely.
> obstinately; stubbornly."

The word 'reckless' implies that one is guilty of more than a mere error of judgment; one is indifferent or headless of the consequences; one is rash or even just careless. See the World Book Dictionary, Vol. 2, supra, at p. 1743. But recklesslessness does not mean that a person acted intentionally: Besner v. The Queen 33 C.R.N.S. 122, 123 (Que. C. A.); Jenkins v. McCuaig (1949) 2 W.W.R. 728 (Alta. S. Ct.). In Speck v. Greater Niagara General Hospital et al, (1983) 43 O.R. (2d) 611 a wrongful dismissal case, Southey J. stated, at 618:

> I am satisfied that none of them intended to cause mental suffering to the plaintiff. They all acted in good faith, in what they thought was the best interests of the hospital, but they obviously acted without any thought to what the consequences of the termination would be to the plaintiff. The termination was a breach of contract on the part of the hospital, and I find that it was a reckless breach in the circumstances described above.

Stroud's Judicial Dictionary, 3rd, ed. Sweet and Maxwell, 1953, says at 2488 and 2489 of "reckless".

> RECKLESS. (1) Recklessness in relation to a statement is a state of mind which does not care whether the statement is true or false (Williams Brothers Direct Supply Stores v. Cloote, 60 T.L.R. 270).
>
> ...
>
> (4) Concerning employers who were reckless in failing to make inquiries whether their servant was insured, "reckless" means more than negligence (Ellis (John T.), Ltd. v. Hinds, (1974) K.B. 475, 486).

Black's Law Dictionary, 5th ed., West Publishing: St. Paul, Minn., 1979, says of "recklessness", at 1143:

> Recklessness. Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended. Blackburn v. Colvin, 191 Kan. 239, 386, P.2d. 432, 437.

D. M. Walker, The Oxford Companion to Law, Clarendon Press, Oxford, 1980 states:

> Recklessness. A state of mind in which a person may do certain acts and which may be relevant to his legal liability for those acts and

> their consequences. Recklessness, like intention (q.v.), requires forsight of certain consequences of his acts as inevitable, or probable, or sometimes even as possible but, unlike intention, involves no desire that these consequences should result or will to bring them about. It is the state of mind of the man who takes a chance or a risk, knowing that there is a risk. As in the case of intentional conduct, forsight may be imputed to a person if a reasonable man would have forseen the consequences as inevitable, or probable, or possible, but absence of desire may appear from the circumstances. If the actor foresees, or must be taken to have foreseen, it does not matter whether he was willing to run the risk or indifferent to it. Recklessness is frequently a requisite of particular crimes, or is specified as the mental element of a crime as a weaker alternative to the intentional doing of the same act.

By expressly referring to an additional award for mental anguish where the infringement has been engaged in "willfully or recklessly", section 40 obviously implies that there can be a breach of the legislation where such elements are not present, that is, where there is not 'malice' or even 'intention'. Section 10 clearly states that there can be a breach of Part I where there is mere constructive discrimination.

Finally, the legislative history of the new Code suggests that the Legislature could not have intended that 'malice' or even just 'intent' was an essential ingredient to a breach of Part I of the Code. Bill 188, s. 3, introduced into the Legislature in November, 1979, provided that "no person shall knowingly discriminate against a person on the ground of handicap ... (emphasis added) but the word "knowingly" was dropped from the new Code (see section 8) in its final form. Perhaps section 8, in itself, requires 'intent' - see Simpson-Sears, supra - but this point is moot given section 10.

It is understandable why there is some confusion in the area of 'human rights' law whereby some equate 'intention' with 'malice'. The historical experience with respect to discrimination has focused upon the hatred and ill-will experienced by racial, ethnic and

religious minorities. Intention to discriminate, and malice or improper motive, were inextricably bound up together. However, the laws against discrimination have progressed far beyond simply the most visible historical injustices. The new Code's "handicap" provisions were enacted primarily to prohibit wide-spread employment practices whereby employers refuse, not out of any malice toward the handicapped, but out of fear, ignorance, stereotypical assumptions, or misguided paternalism, to make employment decisions on the basis of a handicapped person's true ability.

B. What Constitutes An Employer's Defence Under Part II of the Code?

Upon the Commission and Complainant having established a prima facie case of discrimination in employment in contravention of Part I, the onus falls upon the Respondents to establish that there is not unlawful discrimination. In the case at hand, the Respondents can do this by establishing, on a balance of probabilities,

> "16. (1) (b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap."

Section 16 has already been discussed, supra. When a respondent brings herself within paragraph 16(1)(b), then (as provided in the opening words of subsection 16(1)) there is no infringement of a right under Part I. That is, there is not then unlawful discrimination. Note that the requirement for the defence is that the "only" operative reason for the employer's refusal is that the handicapped person is "incapable". It would seem that in a mixed motive situation, the employer would not be able to rely upon subsection 16(1). This approach accords with the treatment of 'mixed motive' situations under the old Code. See Arny Iancu v. Simcoe County Board of Education (1983) 4 C.H.R.R. D/1203 at D/1204-D/1206.

The overall operation of subsection 4(1) and section 16 of the new Code is like that of subsection 4(1) and subsection 4(6) of the old Code (but the operation of subsection 4(6) of the old Code is concerned in respect of only the grounds of age, sex and marital status). If there is a prima facie breach of subsection 4(1) of the new Code in respect of the prohibited ground of handicap by a respondent contrary to section 8 thereof, then the respondent must bring herself within the exception of section 16 to establish that there is not truly unlawful discrimination. Once an employer establishes on a preponderance of evidence that the exception or defence of paragraph 16 (1)(b) has been met, then there has not been a right infringed under Part I. That is, where such a defence is established, there is no unlawful discrimination: there is no breach of subsection 4(1) and section 8. Non-discrimination on the prohibited ground of handicap is the norm; the exception provided in section 16 is to be fairly but strictly construed, so that the policy objectives underlying Part I of the Code are not thwarted. See Ontario Human Rights Commission v. Borough of Etobicoke, supra at D/783.

What does a respondent have to do to establish on a preponderance of evidence that the standard of paragraph 16(1)(b) has been met?

It is not enough for a respondent to establish simply a lack of malice. That is not in accord with the language of paragraph 16(1)(b).

The "bona fide" requirement of subsection 4(6) of the old Code, while literally implying only a subjective aspect, has been held by the Supreme Court of Canada in Etobicoke (supra at D/783) to include both a subjective and an objective component.

> "To be a bona fide occupational qualification and requirement a limitation ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related

> in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

This interpretation has, in my opinion, been adopted by the Ontario Legislature in the standard employed in the new Code for a respondent employer to establish that there is not unlawful discrimination where there is a prima facie case of constructive discrimination under section 10. In such instance, a respondent can establish that the "requirement, qualification or consideration" under attack by the Commission and complaint is a "reasonable and bona fide one in the circumstances". The addition of the word "reasonable" preceding bona fide expressly introduces the objective component adopted in Etobicoke.

Incidentally, where the discrimination is direct or indirect (section 8) as opposed to being merely constructive (section 10), a respondent cannot bring herself within the exceptional provision of paragraph 10(a). Where there is prima facie direct or indirect discrimination, a respondent's only defence is through bringing herself within one of the other (that is, other than section 10) exceptional provisions of the Code, such as section 16, or paragraph 23(b) which extends the exception of "reasonable and bona fide qualification" to a respondent where the prohibited ground under section 4 is "age, sex, record of offences, or marital status."

In Bill 188, 1979, section 4, a "reasonable and bona fide" exemption was extended to a respondent where there had been a prima facie case of discrimination because of handicap. Thus, in Bill 188, both the subjective and objective components of the exemption were present, in respect of handicap situations. However, in Bil 209, 1980, the mixed subjective/objective components of the "reasonable and bona fide" exception were dropped in respect of the ground of "handicap", the subjective component being removed through the adoption of the language now seen in the paragraph 16(1)(b)

exception. In my opinion, paragraph 16(1)(b) expresses, in itself, simply an objective requirement. A respondent must establish by a preponderance of evidence on ar objective basis that the handicap of the complainant renders her incapable of performing or fulfilling the essential duties or requirements relating to the employment position. The subjective component is not present in paragraph 16(1)(b). The respondent's state of mind or bona fides seems irrelevant (except when it comes to the issue of an award - see section 40, discussed infra).

The approach of the new Code in this regard seems different from most other Canadian jurisdictions, which include both the subjective and objective components when dealing with the 'bona fide occupational qualification' defence afforded to employers in 'handicap' situations. See Alberta Individual's Rights Protection Act, R.S.A. 1980, c. I-2, s. 7(3); New Brunswick Human Rights Act, R.S.N.B. 1973, c. H-11, s. 3(5); Prince Edward Island Human Rights Act, S.P.E.I. 1975, c. 72, s. 14(1)(d); Newfoundland Human Rights Code, R.S.N. 1970, c. 262; s. 9(1), as amended by S.N. 1981, c. 29, s. 4(1); Northwest Territories Fair Practices Ordinance, R.O.N.W.T. 1974, c. F-2, s. 13(3), as amended by O.N.W.T. 1980, c. 12, s. 1; The Quebec Charter of Human Rights and Freedoms, S.W. 1975, c. 6, s. 20; and the Canadian Human Rights Act, S.C. 1977, c. 33, s. 14(a). However, British Columbia, Saskatchewan and Manitoba all seem, like Ontario, to base the exceptional defence upon an objective requirement only. See British Columbia Human Rights Code, R.S.B.C.. 1979, c. 186, s. 8(1); the Saskatchewan Human Rights Code, S.S. 1979, c. S-24-1, s. 16(7); and the Manitoba Human Rights Act, S.M. 1974, c. 65, s. 6(6)(b), as amended by S.M. 1982, c. 23, s. 14.

It would seem that the Ontario legislature simply wanted to make it abundantly clear that 'good faith', or lack of malice or improper motive, is irrelevant to handicap situations, by spelling out very expressly in paragraph 16(1)(b) that the defence has to be founded upon an objective basis. (Of course, to bring herself within the exception of paragraphs 10 (a) or 23 (b), an employer must establish an objective basis for refusal to employ as well as subjective good faith). However, where a respondent has an improper

motive for discrimination because of handicap that is the sole operative reason for the discrimination, it would mean there could not be a defence established under paragraph 16(1)(b) in any event, because in such a situation the complainant would not be incapable of performing the essential duties of her employment because of her handicap. Moreover, where a respondent has mixed motives, and an improper motive is one of the operative reasons for discrimination because of handicap, a defence could not be established under subsection 16(1) since the right of the complainant would not be infringed for the reason "only" of being "incapable" within the ambit of paragraph 16(1)(b). Therefore, while paragraph 16(1)(b) expresses, in itself, only an objective component, the opening language of subsection 16(1) says that to establish a paragraph 16(1)(b) defence the only reason must be that the complainant is "incapable ... because of handicap". If another operative reason for the discrimination is bad motive, paragraph 16(1)(b) would not afford a defence.

Summing up, it is clear that in all eleven of the Canadian jurisdictions just referred to supra, that an arbitrary assumption by an employer regarding a handicapped complainant's ability is not a defence even when such an assumption is held without any improper motive. As was stated in considering the provisions of the Canadian Human Rights Act,

> "However, the point must be made that the very fact that the handicapped are now given rights to protest discrimination in relation to employment under the Canadian Human Rigths Act provides a very strong indication that assumptions made by employers about what they think are the abilities of the handicapped are no longer sufficient to counter a charge of discrimation under the Act." Ward v. Canadian National Express, (1982) 3 C.H.R.R. D 685, D 697.

To establish that she is within the exception of paragraph 16(1)(b), an employer must establish on an objective basis by a preponderance of evidence, that the complainant's handicap precludes performance or fulfilment of essential duties or requirements in respect of the prospective employment. The respondent employer's honesty of intention does not,in itself, bring her within the exception. However, honesty of intention (i.e. lack of bad motive) does allow a respondent to rely upon the paragraph 16(1)(b) defence, if the employer can establish, on an objective basis, that the complainant is "incapable of performing or fulfilling the essential duties" of the job because of handicap.

In the instant situation, the individual Respondent, Mrs. Merlene Nelson, was an experienced nurse in nursing homes who made her decision to refuse employment because of handicap not only with honesty of motive but also based upon her considerable experience and reinforced by her colleague, Olga Brown's judgment as well, and that also was based upon considerable job experience as a nurse in a nursing home. However, such honesty of motive of the Respondent, Mrs. Nelson, and Mrs. Brown, in making a judgment about Ms. Cameron's handicap, is not enough to provide a defence. Looking at the objective evidence, have the Respondents established on a preponderance of the evidence that Cindy Cameron was (and is) incapable of performing the essential duties or requirements of a nurse's aide?

What do the words of paragraph 16(1)(b) mean? "Essential" means that which is "needed to make a thing what it is; very important; necessary" - The World Book Dictionary, Vol. 1, supra, p. 727. Synonyms are "indispensable, requisite, vital". Thus, peripheral or incidental, non-core or non-essential aspects of a job, are not pertinent to a determination under paragraph 16(1)(b). For example, if a handicapped person used a pencil to write with in her work as a nurse's aide, and had no difficulties with any aspect of her work, but could not sharpen pencils by herself because of her handicap, the employer could not bring herself within the exception of paragraph 16(1)(b) as pencil-sharpening would simply be an incidental, non-essential, aspect of the job (which could

easily be done by someone else, without any real inconvenience for the employer). Therefore, paragraph 16(1)(b) builds in an aspect of reasonable accommodation being required of an employer.

"Duty" is defined in The World Book Dictionary, Vol. 1, supra, at p. 655, as meaning:

> "1. a thing that is right to do; what a person ought to do; obligation ... 3. the thing that a person has to do in doing his work; function; business; office (with a suggested synonym being "responsibility").

"Duty" is discussed in Black's Law Dictionary, 5th ed., West Publishing: St. Paul, Minn., 1979 at 453:

> Duty. A human action which is exactly conformable to the laws which require us to obey them. Legal or moral obligation. Obligatory conduct or service. Mandatory obligation to perform.
>
> ...
>
> A thing due; that which is due from a person; that which a person owes to another. An obligation to do a thing. A word of more extensive signification that "debt", although both are expressed by the same Latin word "debitum". Sometimes, however, the term is used synonymously with debt.

"Requirement" is defined in the World Book Dictionary, Vol. 2, at p. 1775, as meaning:

> "1. a need; thing needed (with the suggested synonym being "essential") 2. a demand; thing demanded."

With respect to "requirements", Stroud's Judicial Dictionary, supra says at 2565:

> (3) Requirements as meaning "needs": see Kier & Co. v. Whitehead Iron & Steel Co., 168 L.T. 228.

In short, is Cindy Cameron capable of performing the essential tasks of the nurse's aide position in the Respondents' nursing home? Is she competent to do such tasks?

I have stated that paragraph 16(1)(b) equates with the objective component of the mixed subjective/objective components test as determined by the Supreme Court of Canada in interpreting subsection 4(6) of the old Code - see Etobicoke, supra at D784, per McIntyre, J..

There is a wealth of jurisprudence on what constitutes a "bona fide occupational qualification" exception: Carson et al v. Air Canada, (1984), 5 C.H.R.R. D/1857 at D/1867-D/1874 (Review Tribunal under the Canadian Human Rights Act).

The cases emphasize that a respondent cannot rely upon mere "impressionistic" evidence. In some situations it would be obvious on mere observation that a person could not perform the essential functions of a job. For example, a person without arms would seem not to be able to perform the essential tasks required of a nurse's aide. Where the situation is readily apparent to any reasonable person, the employer could meet the onus of paragraph 16(1)(b) on a preponderance of evidence basis. However, it is not sufficient for an employer to simply form an impression, albeit an honest one in the sense that no improper motive is present, that a person's handicap prevents her from performing the essential tasks of a job. In the instant situation, it is my view, and I so find, that lifting of patients is an essential (although relatively minor, but nevertheless, essential) aspect

of the nurse's aide job function. However, it is also my view that it is not apparent to a reasonable person observer that Cindy Cameron's handicap renders her incapable of performing the task of 'lifting' in the job of nurse's aide. It is not enough for the individual Respondent in the present case to say that, in her opinion, the Complainant is incapable of lifting patients, or, at the least, incapable of lifting patients without perhaps putting them at increased risk. The Complainant's handicap does not, in itself, suggest that there is any reasonable likelihood of her having any greater difficulty in lifting than a non-handicapped nurse's aide where everything else is equal. At the least, in the circumstances, the individual Respondent, Mrs. Nelson, should have put Ms. Cameron to the test of a simulated exercise in lifting a patient. There was no reason why this was not done. If it had been done, I am confident Ms. Cameron would have demonstrated to Mrs. Nelson that she would have no difficulty in lifting patients.

Therefore, the Respondents have not met the onus to prove by a preponderance of evidence that they come within the exception of paragraph 16(1)(b). Even if the Respondents had adduced some evidence toward meeting the standard of paragraph 16(1)(b), the evidence of the Commission and the Complainant clearly establishes on a preponderance of evidence basis that the Complainant's handicap will not in any way restrict her in being able to lift patients in a nursing home. The evidence of the Commission was very thorough in preparation, and very impressive in presentation. The evidence of Dr. James Cunningham, Dr. Hugh G. Thompson, and Mrs. Thelma Davis, as expert witnesses, was objective, thorough, and very explicit to the effect that Ms. Cameron's handicap would not present any problems in 'lifting' patients. They corroborated and fortified the opinion of the Complainant herself, that she would have no trouble in lifting.

In making the above findings, I am mindful of the argued possibility that patients might be at risk by a nurse's aide who has difficulty in gripping and hence, lifting. Where the safety of the public is at stake, the evidence required of an employer to meet the standard of paragraph 16(1)(b) will be relatively modest. However, there was no evidence

in the instant case, other than the mere impressionistic view of Mrs. Nelson and Mrs. Brown, and all of the objective evidence was, quite forcefully, in support of the Complainant's position that her handicap did not render her any less capable than a non-handicapped person in being a nurse's aide. Her handicap is, on the evidence, irrelevant to her performing all the essential tasks of a nurse's aide in the Respondents' nursing home. In fact, in one sense it has created an asset, because Ms. Cameron is quite empathetic to the problems and shortcomings of others. Her handicap has given her an understanding and maturity far beyond her years. As Mrs. Solimano said of her initial impression, Ms. Cameron has a "caring" disposition. The unenjoyable aspects (incontinent patients, etc.) of a nursing home do not bother her. She has a pleasant personality, excellent experience, and is a strong and sturdy person physically in good health. Her youthful enthusiasm and sincere interest in caring for others would make her an "ideal" employee for any nursing home, as Mrs. Solimano concluded at the time of the initial interview October 1, 1982.

Ms. Cameron was denied her right to equality of treatment in employment because of her handicap, in contravention of subsection 4(1) by the direct act of the individual Respondent, Mrs. Nelson, in contravention of section 8 of the Code.

Liability of an Employer for a Breach of the Code by an Employer.

Subsection 40(1) of the Code allows a Board of Inquiry to make an order against a respondent party, providing a remedy to a complainant, where the right of the complainant under Part I of the new Code has been infringed in "contravention of Section 8". Paragraph 19(b) of the old Code provided that a Board could make an order against any "party who has contravened this Act". Such a provision was interpreted by the B.C. court in Nelson et al v. Byron Price Associates, (1980) 106 D.L.R. (3rd) 486, 17 B.C.L. 259 (BCSC), dismissed on appeal, (1981), 122 D.L.R. (3rd) 340 (BCCA) to mean that a party against whom an order is directed must personally contravene the legislation.

With both the old Code and the new Code a party must contravene the Code before an order can be made against her. Subsection 40(1) of the new Code does not expand upon the former paragraph 19(b) of the old Code in so far as resolving the question as to whether an employer must be personally in breach of the Code to have contravened the legislation, or whether there can be a contravention on a vicarious liability basis. To answer this, one must look to other provisions of the new Code.

Under subsection 44(1), the act of an officer or employee done in the course of his or her employment generally will be deemed to be an act of the employer corporation. Thus, the statute expressly states in subsection 44(1) the position arrived at by the case law under the old Code where the offending employee was part of the "directing mind" of the employer corporation (the exceptions being where the act is harassment - ss. 2(2), 4(2) and 6, or where there is a prosecution under the offence section - s. 43). See Olarte et al., v. Commodore Business Machines and DeFilippis, (1983) 4 C.H.R.R. D/1075 at D/1737-D/1747. An employer corporation in a situation where subsection 44(1) is brought into play, would necessarily have to be a party to the proceeding before the board of inquiry (subsection 38(2)(c) or (d)). See generally Bhajat Tabar and Chong Man Lee v. David Scott and West End Construction Limited, (1982) 3 C.H.R.R. D/1073 at D/1074, D/1075, (Ontario Board of Inquiry Interim Decision) as to the adding of parties. In the instant situation, if Mrs. Nelson, an officer and employee of the Respondent, Nel-Gor Castle Nursing Home, is in breach of subsection 4(1) and section 8 of the Code, then an employer corporation is also in breach by virtue of subsection 44(1), because clearly the discriminatory act of Mrs. Nelson was done in the course of her employment.

It seems, as discussed in Olarte et al v. Commodore Business Machines and DeFilippis, supra, at D/1737-D/1747, an employer is in breach of the new Code in the following types of situations.

(1) Where the employer herself, by her own personal action, directly or indirectly, intentionally infringes a protected right, then she has, of course, personally contravened section 8 of the new Code.

Similarly, the employer could be in breach of section 4 of the old Code: for example, where an unincorporated, sole proprietorship refuses to employ on a prohibited ground; or under section 3 of the old Code, where an unincorporated landlord discriminates against a complainant in the occupancy of a commercial unit on a prohibited ground - Blake v. Laconte, (1980), 1 C.H.R.R. D/74.

(2) Where the employer does not intend to discriminate, but there is constructive discrimination, then the employer is in contravention of section 10 of the new Code. That is, the employer has personally breached the Code.

(3) Where the employer herself takes no direct action of discrimination, but authorizes, condones, adopts, or ratifies an employee's discrimination, then the employer is herself personally liable for contravening the Code (whether on a basis of contravening section 8, or section 10 of the Code) as it is the employer herself who has infringed or done, directly or indirectly, an act, "that infringes a right under this Part" (section 8). Section 8 of the Code says "No person shall infringe or do ... anything that infringes a right ...". The employer is infringing or doing something by its mere passive inaction of allowing an infringement of a right in the workplace when the employer could rectify the situation. To do nothing can be, in the circumstances, to "do" something that "infringes a right" within the meaning of section 8.

Similarly, there could be a breach by an employer of section 4 of the old Code, (for example, S.S. Dhillon v. F. W. Woolworth Company Limited (1982) 3 C.H.R.R. D/743 at D/763, where the management in a warehouse "knew, or should as reasonable men acting as management have known, that there was regular, and significant verbal racial harassment" and "did not take reasonable steps to put an end, or at least minimize, the racial abuse."; see also Kotyk and Allary v. Canadian Employment and Immigration Commission and Chuba, (1983), 4 C.H.R.R. D/1416, (which decision has been upheld by a Review Tribunal, 1984, as yet unreported).

(4) Where the employer is a corporate entity, and an employee is in contravention of the Code, and that employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. Similarly, the case law held that there could be liability on this basis under the old Code. (For example, where the sole managerial employee was guilty of sexual harassment, then the employer corporation was itself personally committing the act of sexual harassment: Cox v. Gadhoke (1982) 3 C.H.R.R. D/609. While they were not necessary facts to the result, in that case the individual respondent was not only the sole manager, but also was the owner (shareholder), a corporate officer, and corporate director. Any one of these

factors, coupled with the improper act coming in the course of carrying on the corporation's business, would have rendered the corporation in personal contravention of the new Code).

(5) The difficulty in applying the organic theory of corporate responsibility (as referred to in #4) comes in the factual determination as to whether the employee in question is part of the 'directing mind'. Gadhoke illustrates the obvious case - the individual respondent was the sole manager, the owner, corporate officer and corporate director. Other situations are not as easy. Generally speaking, whenever an employee provides some function of management, then she is part of the 'directing mind'.

(6) Where an employee, in contravention of the Code causes the breach of a contract between her employer (the employee-agent's principal) and a complainant, then the employer would be liable for a contravention of the Code under the common law in respect of agency, for the act of the employee-agent is the act of the employer principal so far as the third party complainant is concerned. (Note that section 3 of the new Code covers the formation of contracts).

(7) Let us now consider the issue of "vicarious liability", when none of the factors in #1 to #6 above are present. If the employee were a mere servant (not part of the 'directing mind', and there were not a contract between the employer and a third party that the servant-agent is causing a breach of) then

the employer was not liable for a contravention of the old Code by the employee in the course of her employment, if there was no personal contravention of the Code by the employer. See Nelson, supra; Simpson-Sears, supra.

Suppose an employee for a landlord refuses to rent to a prospective tenant, on a prohibited ground, in contravention of section 8 of the new Code. The employee does this notwithstanding the express general direction of the employer to all of its employees not to discriminate unlawfully. Before the aggrieved prospective tenant can complain to the landlord, the employee leases the premises to an innocent third party. Can the prospective tenant-complainant come against the employer for the employee's breach of the new Code? That is, is the employer vicariously liable for the employee's breach? (Assume, for the sake of argument that the wrongdoing employee cannot be characterized as part of the 'directing mind' of the employer).

The new Code, unlike the old Code, has an express provision which renders the employer vicariously liable for the employee's breach "in the course of his or her employment."

> 44. (1) For the purpose of this Act, except subsection 2(2), subsection 4(2), section 6 and subsection 43(1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade

> union, trade or occupational association shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employees' organization. (emphasis mine).
>
> (2) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, a board of inquiry in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1).

Thus, under the new Code there is vicarious liability for breaches of the Code, except in 'harassment' situations (subsections 2(2), 4(2) and section 6) and where the offence provision (subsection 43(1) is involved) as the liability attaches to the employe even where the discriminatory act is done by a a mere "employee" (i.e. not by someone who is part of the 'directing mind'). Therefore, while situations #1 to #6 above would apply, in my opinion, in respect of a situation under the old Code given the development of the case law, subsection 44(1) of the new Code expressly imposes liability by statute in situations #4, #5, and #6, and goes further to cover situation #7, not covered by the old Code.

As a result, there is generally vicarious liability under the new Code for situation #7 above, other than in the noted exceptional situations.

However, the analysis of the differences in the range of situations between #1 and #7 above remains important when considering complaints under the new Code where the complaint relates to 'harassment' and thus is excepted from the 'vicarious liability' impact of subsection 44(1). The point is - the dividing line between situations of 'personal liability' (situations #1 to #6) and the situation of vicarious liability (#7) remains important. It is only in the #7 situtation that an employer is not liable for the 'harassment' by an employee. If it is a situation of sexual harassment by a mere employee (i.e. not someone who is part of the directing mind) of the corporate employer, then by virtue of the excepting provision in subsection 44(1) vicarious liability does not attach to the employer. However, if the employee sexually harassing is part of the directing mind of the employer, then while subsection 44(1) does not apply (i.e., there is no deeming of the discriminatory act of the employee to be the act of the employer) there can be personal liability on the part of the employer on the theory as advanced in situations #4 and #5.

The approach of subsection 44(1) in expressly providing for vicarious liability is clearly consistent with, and facilitative of, the general public policy purposes of the new Code. The provision is also supportive of other specific provisions of the new Code. Subsection 40(1) provides for a board of inquiry to make an order "to achieve compliance with this Act" and "to make restitution, including monetary compensation, for loss ...". That is, in so far as the particular complainant is concerned, the effect of the new Code is to provide the equivalent of a tort by statute. It is clear that the general benefits to society through enforcing the new Code are largely to be achieved by extending, in effect, a civil remedy to individual, aggrieved complainants. It would be anomalous for an individual to have a broader scope for success against parties for torts under the common law (which allows for vicarious liability where there is a mere master-servant relationship and a tort in the course of the servant's employment) and yet be limited (by there being no vicarious liability) in seeking restitution for the breach of the new Code by a servant in the course of her employment. Discrimination on a prohibited ground is a

statutory wrong that offends society and is thus a wrong against the public, but it is also in the nature of a tort against the individual - a tort being a civil wrong independent of contract. Is there any meaningful distinction between physical injury due to trespass or negligence, and injury due to discrimination on a prohibited ground? Subsection 44(1) has the impact of saying that there is no meaningful distinction - vicarious liability should generally attach to the employer where its employee discriminates in the course of her employment.

Applying subsection 44(1) to the instant situation, the discriminatory act of the Respondent, Mrs. Nelson, done in the course of her employment with Nel-Gor, is deemed to be the act of Nel-Gor. Hence, Nel-Gor itself is in breach of subsection 4(1) and section 8 of the Code.

12. REMEDIES.

Subsection 40(1) governs the award of monetary compensation for breaches of the Code.

> 40. (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000. for mental anguish.

The remedy provisions of human rights legislation should be construed liberally to achieve the purposes and policies of the legislation: See Rand et al., v. Sealy Eastern Limited, (1982) 3 C.H.R.R. D/938 at D/956.

Order Directing An Offer of Employment to the Complainant.

The Complainant did not ask for an order against the Respondents directing that an offer of employment be made to Ms. Cameron, as she has now secured other employment. However, in my discretion I am going to make an order so directing, in any event. Paragraph 40(1)(a) confers upon me such discretion, and it seems to me that such an order is the primary remedy to a Complainant who has been denied her right to equal treatment with respect to employment because of handicap. Paragraph 40(1)(a) reads:

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

Such an order, even it if is not acted upon by the Complainant, is facilitative generally of achieving compliance with the Code not only "in respect of the Complaint (but also) ... in respect of future practices". The Complainant can, at her option, choose whether or not to act upon this order in due course. Her circumstances may then perhaps be such that she wishes to avail herself of this order, which she should be entitled to do, given my findings on the evidence.

Damages.

There is a presumption in favour of the making of an award of special and general damages in human rights cases.

> Therefore, I think that a presumption in favour of awarding both special and general damages should be made by Boards of Inquiry. Compensatory awards should not be completely discretionary. (Rosanna Torres v. Royalty Kitchenware Limited, (1982) 3 C.H.R.R. D/858 at D/869).

> Since Parliament has indicated the desirability of compensating financial losses resulting from discriminatory practices, it seems only reasonable, in view of the philosophy underlying the legislation, that this should be the norm, applicable except if some good reason for not awarding compensation can be proved. (Foreman v. Via Rail, 1 C.H.R.R. D-233, 235, cited with approval under the Ontario Code in Rosanna Torres v. Royalty Kitchenware Limited, (1982) 3 C.H.R.R. D/858 at D/869.)

Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code: It is important that damage awards not trivialize or diminish respect for the public policy declared in the Human Rights Code.

The objective to be achieved by an award of monetary compensation under the Code is restitution, that is, the eradication of the harmful effects of a respondent's actions on the complainant, and the placing of a complainant in the same position in which she would have been, had her human rights not be infringed by the respondent.

> The root principle of the civil law of damages is 'restitutio in integrum': the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses. (Foreman, et al., v. Via Rail Canada Inc. (1980) 1 C.H.R.R. D/233 cited with approval in Rosanna Torres v. Royalty Kitchenware Limited, et al., (1982) 3 C.H.R.R. D/858, at D/869 and Rand et al., v. Sealy Eastern Limited, Upholstery Division (1982) 3 C.H.R.R. D/938 at D/954. and Olarte et al., v. Commodore Business Machines et al., (1983) at 4 C.H.R.R. D/1705).

To discover the true degree of harm or loss suffered by the complainant, requiring compensation under the principle of restitution, the mental state of the respondent is irrelevant, and is not a factor to mitigate damages. Excerpts from board of inquiry decisions make this clear:

> ... I view the mental state of a respondent as being relevant only in so far as it might relate to the degree of injury suffered by a complainant. It ought not to mitigate or augment the compensation payable to a complainant once the degree of injury has been assessed." (Torres v. Royalty Kitchenware Limited, supra, at D/868)

> I doubt that he bears any conscious malice toward blacks. I infer that he acted as he did toward Mrs. Blake because his view of blacks is that of an unfavourable and incorrect stereotype. His fixed mental impression is that someone who is black cannot be a financially responsible tenant, ... and that he ... can treat her in a discriminatory manner because he would prefer her to cease to be a tenant simply because she is black ... Given the very serious, continuing affront to Mrs. Blake's dignity and feelings, and taking into account all the circumstances of this case, I award Mrs. Blake $800 in general

> damages for the injury to her feelings and dignity ... (Blake v. Laconte, 1980 1 C.H.R.R. D/74, D/82-83).
>
> Although we have no doubt as to the respondent's good faith, we are of the opinion that it does not justify denial of compensation for reduced income resulting from the discriminatory practice. Nowhere in section 41(2) (of the Canadian Human Rights Act) is there any reference to the motivation or state of mind of the respondent ... The financial losses suffered by a victim are exactly the same whether the discrimination was committed in good faith or bad faith." (Foreman v. Via Rail Canada, supra, at D/235).

In Torres, I approved the foregoing, stating,

> This strikes me as being a sensible approach in construing the Ontario Code as well. Section 19 of the (old) Code expresses a legislative policy that victims of discrimination may be compensated ... part of the attractiveness of the Foreman approach lies in the consistency and predictability in damage awards that it would encourage. Extraneous factors, such as the respondent's attitude, could not be weighed by a Board in assessing the quantum of damages to which a victim would be entitled. (Torres v. Royalty Kitchenware, supra,. at D/869).

In an employment discrimination case under the new Code, as under the old Code, a complainant may be awarded special damages for economic loss suffered consequent to the respondent's denial of the complainant's right to equal treatment in employment. An award of special damages can include, where an applicant for employment is not hired, an amount for lost wages.

As a general rule, the principles governing assessment of special damages in human rights cases are those which apply at common law for the assessment of tort damages. Principles governing assessment of damages in contract cases are not applicable in human rights cases.

> ... what is the proper approach to the awarding of damages under the Ontario Human Rights Code? ... The contract model of damages seems inappropriate ... The approach to damages under tort law is, I think, to be preferred." (Rand et al., v. Sealy Eastern Ltd., Upholstery Division, supra, D/956.

A complainant who is refused a job because of handicap is entitled to lost income for the wages which she would have earned had there been no refusal to hire. Lost wages are payable for a reasonable time, that being a reasonably foreseeable period for the complainant to seek alternative employment.

> Applying that approach (i.e. tort law's approach) to human rights situations would make employers liable for damage that is reasonably foreseeable at the time of the discriminatory act. ... In my view, a respondent is only liable for these damages (i.e. lost wages) for a reasonable period of time; a "reasonable" period of time being one that could be said to be reasonably foreseeable in the circumstances by a reasonable person if he had directed his mind to it. This would amount to the duration of time the employee could reasonably be expected to take mitigating his loss by finding a comparable job. (Rand et al., v. Sealy Eastern Ltd., supra, at D/965-D/957, approved in Olarte et al., v. Commodore Business Machines, supra; and also cited with approval in Mears v. Ontario Hydro, as yet unreported Ontario Board of Inquiry, Reasons for Judgment of Chairman Zemans, released December 16, 1983).

An award for lost wages is not limited to the period of notice with which the employer is bound to comply under contract and employment standards rules.

> It would be contrary to the spirit of the Code to allow an employer to dismiss an employee for a prohibited reason provided the employer gives adequate notice, the adequacy being determined by the employee's rank rather than the reason for the dismissal or his ability to obtain similar employment elsewhere. (Rand et al., v. Sealy Ltd., supra, at D/956).
>
> ...
>
> The factors considered in wrongful dismissal cases should be kept in mind in quantifying damages in human rights cases. However, as I stated in Rand, the Code is not concerned with wrongful dismissal per se, but rather with the reasons for the dismissal." (Olarte et al., v. Commodore Business Machines and DeFilippis, supra, at D/1736).

A complainant is under a duty to take reasonable steps to mitigate her loss. (Rand, supra at D/949; and Olarte et al., v. Commodore Business Machines and DeFilippis, supra, at D/1736-D/1737).

Considering the evidence in the instant case, it is clear that the Complainant would have worked six shifts, each eight hours long, every two weeks, at a wage of $5.70 per hour for a total weekly wage of $136.80. The Complainant would have commenced work with the Respondents October 25, 1982 had she been hired, and she was not able to find other work immediately, but returned to school February 1, 1983. She is entitled to lost wages for this fourteen week period, totalling $1,915.20.

On the evidence, the Complainant took all reasonable steps to mitigate. Mrs. Nelson told her October 8, 1982, when she refused to employ Ms. Cameron as a nurse's aide, that she might be able to work in the crafts department of the nursing home. However, it is clear that there was no actual opening in the crafts department on October 8, 1982, and further, that this alternative position was not, in fact, ever offered

to Ms. Cameron at any time. Had Ms. Cameron been offered an alternative job, in the crafts department at Nel-Gor, she would have been obliged to accept the position in mitigation of her damages, without giving up her rights under the Code, (In the instant case, Mrs. Nelson was polite toward Ms. Cameron at all times and there was no suggestion that there would be on-going personal animosity, which would have made working in an alternative position difficult). However, no alternative position of employment was ever offered. In all the circumstances, the Complainant took all reasonable steps possible to mitigate her damages. It is irrelevant that the Complainant testified that she would not have worked in the Respondents' craft department because she was offended and hurt by what happened to her October 8, 1982. The point is, a position was never offered to her which she could have accepted, even if she would not have done so in fact.

The new Code, like the old Code, allows for the award of general damages for, inter alia, injury to dignity and self respect, and loss of the right to freedom from discrimination.

Where a contravention of the Code results in injury to the complainant's dignity or self-respect, general damages for this loss should reflect the seriousness of the injury caused.

> It is most important to one's personality, character, bearing, and even self-confidence to know that a denial of employment is due to a factor that one can overcome, or change, like a work record, rather than due to a factor that one cannot change, and which is not relevant to employment potential, like one's race, ancestry, or place of origin. The discouragement to Mrs. Morgan in putting herself forth to any other employer is incalculable, although considerable. To one seeking a supervisory position especially, which requires greater self-confidence than that of a regular employer, this is a severe blow. Such injury to a person's feelings and dignity,

> the discouragement and loss of self-confidence resulting, faced as that person would be with the hopeless conclusion that one's impediment is beyond one's power to change, is not to be lightly assuaged, even with an amount of $1,700.00. Nevertheless, at least such a grant of general damages might act as an important encouragement to Mrs. Morgan and others that the majority of people in this province, represented through the Legislative Assembly, do not favour discrimination on irrelevant and unjustifiable grounds, but rather, have declared that it is public policy in this province 'that every person is free and equal in dignity and rights ...'. (Morgan v. Toronto General Hospital, 1977 Ontario Board of Inquiry, unreported, Tarnopolsky, Oct. 14, 1977 at 32-33).

An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers. (Rand v. Sealy, supra, at D/956).

It is clear under the old Code that a Complainant could also be compensated for emotional upset, psychological damage or mental anguish, caused by the denial of her fundamental human rights. (Torres v. Royalty Kitchenware, supra, at D/868).

In the instant case, the Complainant truly suffered because of the denial of employment by the Respondents. She knew she was well-qualified for the position, it was her first opportunity for employment at doing something she very much wanted to do, in her chosen field of endeavour, and she knew she was being turned down simply because of her handicap, a birth defect which had singled her out for unfair, exceptional treatment by others all her life.

She was undoubtedly hurt deeply and psychologically traumatized by the event. Her self-confidence was shattered. She suffered severe depression for some two weeks following the incident, and then gradually improved. Ms. Cameron was, understandably, a particularly sensitive individual. She was more emotionally upset from the denial of this opportunity for employment than a non-handicapped person who might have been turned away for a non-relevant and arbitrary reason but one unrelated to a prohibited ground under the Code.

A complainant may suffer greater injury and loss as a consequence of a contravention of the Code by virtue of the fact that such complainant is susceptible to suffer greater injury than a non-handicapped person, being viewed as a 'thin-skulled' complainant. The respondent is liable for compensation which includes that necessary to compensate for the increased injury and loss suffered by the 'thin-skulled' complainant. (Rand v. Sealy, supra, at D 957).

I have some difficulty in interpreting paragraph 40(1)(b) which reads:

> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

I have already referred to dictionary definitions for "wilfully" and "recklessly", supra. It seems to me that "wilfully" as used in paragraph 40(1)(b), and preceded by "where the infringement has been engaged in", means "intentionally", "knowingly" or "deliberately".

I have also referred to the dictionary meanings of "recklessly", supra. It seems to me that "recklessly", as used in paragraph 40(1)(b), and preceded by the phrase "where the infringement has been engaged in ..." means more than mere or ordinary negligence.

For the "infringement to be engaged in recklessly" means the contravenor's conduct must be such as to evince disregard of or indifference to consequences, that is, the conduct is done with rashness or heedlessness; it is done wantonly. The state of mind of the contravenor pays no regard to the probable or possibly injurious consequences accompanying her conduct, and the contravenor persists in spite of such knowledge.

At first impression, paragraph 40(1)(b) perhaps seems to say that the Code allows a board's order "to make restitution" which can include monetary compensation, say for lost wages, but such compensation can only include compensation by way of general damages for mental anguish where "the infringement has been engaged in wilfully or recklessly" and then only up to a ceiling of $10,000.00. To adopt such a narrow interpretation would mean that the new Code is not as liberal as the old Code in affording a remedy by way of general damages to compensate for mental anguish where there was no wilfullness or recklessness. Indeed, the cases considered that to achieve restitution, the mental state of the respondent was irrelevant, and not a factor to mitigate damages. See the excerpts from Torres v. Royal Kitchenware Limited, Blake v. Laconte, and Foreman v. Via Rail Canada, referred to supra. It is inconceivable that the remedies under the new Code would be less than those under the old Code, at least without any mention of this intention by the Legislature in the debate upon the intended legislation, and there is no such suggestion in the Legislature's discussions leading to passage of the new Code. Indeed, the discussion is to the contrary, that is, that the new Code not only gives broader protection, as it does, but also expands upon the remedies for an infringement.

It seems to me that the first two lines of paragraph 40(1)(b) afford a complainant with the remedy of special and general damages as provided by the old Code as interpreted by boards of inquiry, and that the last three lines of paragraph 40(1)(b) go further, and provide for what is, in effect, punitive damages "where the infringement has been engaged in wilfully or recklessly".

It is problematic that punitive damages could be awarded under the old Code. Torres v. Guercio, supra, and Olarte et al., v. Commodore Business Machines and DeFilippis, supra.

A variety of awards were made under section 19 of the old Code, that were other than compensatory with the purpose of educating wrongdoers and to ensure future compliance with the old Code. See, for example the order made in Dhillon v. Woolworth, (1982) 3 C.H.R.R. D/743 at D/763, D/764. Paragraph 40(1)(a) of the new Code is very broad in empowering a board of inquiry to make any order to,

> (a) direct the party to do anything that, in the opinion of the board, the party out to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

However, boards concluded that punitive damages could not be awarded under the old Code because, first, the empowering section of the old Code, section 19, referred only to "compensation" and second, a punishment provision was contained in section 21, which implied that punishment was beyond the sphere of a board's powers in section 19: Shirley Gabiddon v. S. Dolas (Ontario: unreported, Lederman, July 19, 1973, at p. 33), cited in Olarte et al., v. Commodore, supra at D/1747).

Under the new Code, the empowering provision, paragraph 40(1)(b) refers only to "monetary compensation" and, indeed, refers to it in the context of being included within "restitution". As well, section 43 is expressly a penalty provision (like section 21 of the old Code). The decision of the Ontario Labour Relations Board in United Steelworkers of America v. Radio Shack (1979) O.L.R.B. 1220, is instructive.

(1) A Remedy is Not A Penalty

94. If deterrence was all that the board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating the Labour Reltations Act. But the Legislature did not provide the Board with this role and probably with good reason. See Little Bros. (Weston) Limited (1975) OLRB Rep. Jan. 83, at 91. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See Criminal Code, R.S.C. 1970, c. C-34, s. 5, 423 (2)(a); Re Regional v. Gralewicz et al (1979), 45 C.C.C. (2d) 188 (Ont. C. A.). By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. It is were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiction.

...

(2) Monetary Relief is Compensatory

96. This is a corollary to the no-punishment principle. While it may be discouraging to the Board where, for example, the reinstatement of an employee with back pay, is simply inadequate to deter repeated offences, this is not justification for the application of additional monetary penalties in the guise of compensation. Thus, it is conceivable that the Board might change its policy and no longer require the mitigation of losses by employees who are subject to an unfair labour practice discharge. The change might be justified by the argument that the employer is paying no more than he would have had to pay had the person been employed up to the date of his reinstatement. However, it would be clear to those who regularly appear before the Board that our primary purpose was more in the vein of making unfair labour practice compensation orders more painful. On the other hand, our back-pay and compensation awards should be as fully compensatory as possible and, on request, could bear interest. Our approach might be analogous to that provided for by The Judicature Act, R.S.O. 1970, c. 228, as amended S.O. 1977 c. 51, s. 38. See also Sedgewick and Metropolitan Toronto Zoological Soceity (1979), 22 O.R.. (2d) 225.

I think paragraph 40(1)(a) is intended to empower boards to make directing orders of a non-monetary nature, such as, for example, a 'cease and desist' order in respect of an employer's discriminatory practice, or requiring an employer who has contravened the Code to hire a person. Paragraph 40(1)(b) seems to be the empowering provision so far as ordering monetary awards.

However, perhaps an award of punitive damages might be made under paragraph 40(1)(a):

> In certain cases, it may be highly instructive for a respondent to face the paying of a penalty. If the Board is of the opinion that no other order could be so effective as to encourage future compliance with the Code as a punitive order, then I believe that an order of punitive damages might be proper. Such an award would be consistent with the educative purpose of the Code. It must be pointed out though, that such an award should have as its sole purpose the prevention of future breaches of the Code. That is, the penalty should be made only to effect deterrence, not to denounce the act or wrongdoer, nor to exact retribution. Any aim other than "full compliance" with the Code, i.e., deterrence from future breaches, would certainly be, in my opinion, beyond the powers of a Board of Inquiry.
>
> Even if this interpretation is correct, punitive awards would be very rarely made. For most respondents, the mere participation in inquiry proceedings or the awarding of compensatory damages alone will have a deterrent effect. Only where a Board is of the opinion that a greater deterrent is needed would punitive damages be necessary. (Olarte et al v. Commodore Business Machines and DeFilippis, supra at D/1747, D/1748).

The above points support the argument that the last three lines of paragraph 40(1)(b) cannot be construed as allowing an award of punitive damages, but rather serve to limit a compensatory award of general damages for mental anguish to the situation "where the infringement has been engaged in wilfully or recklessly", and to a limit of $10,000.00.

However, there are points to support the contrary argument, that the last three lines of paragraph 40(1)(b) must be construed to expand upon what a board of inquiry is otherwise empowered to do by the first two lines of the paragraph. First, as mentioned supra, it seems the new Code was considered by the Legislature as expanding upon both rights and remedies as provided by the old Code.

The Minister of Labour, the Hon. Dr. Robert G. Elgie, spoke of Bill 7 at Second Reading, May 15, 1981 (Hansard No. 21, pp. 743, 744):

> I will touch briefly on the administrative, procedural and structural changes that have been proposed, changes which I believe will clarify the role of the commission, facilitate its operation, and help to ensure greater equity for all parties before it.
>
> ...
>
> Boards of inquiry are, in addition, given expanded remedial powers. They are empowered, for example, to issue orders requiring landlords and employers to take appropriate action to prevent future harassment of tenants and employees by fellow tenants and employees. They may also award damages for mental anguish, and in appropriate circumstances may make orders for access to premises and facilities following findings of discrimination on the ground of handicap, contrary to the code. (emphasis added).

Second, if "restitution" and "monetary compensation" in the first two lines of paragraph 40(1)(b) are interpreted as allowing for full restitution by way of monetary compensation "for loss arising out of the infringement", then an award given under the last three lines may be interpreted as going beyond "loss", to permit a punitive element. If the last three lines were intended to limit or qualify the first two lines, then clear language could easily have done so.

> Sometimes, however, the word "include" is used "in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those

> things which the interpretation clause declares that they shall include." In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable." (Maxwell, On The Interpretation of Statutes, 12th ed., (London, 1969) at 270-271).

Third, as mentioned in the quotation taken from the Olarte case, a punitive monetary award order might be appropriate in given circumstances to encourage future compliance with the Code. Finally, it seems the language of paragraph 40(1)(b) of the Ontario Code has been adopted from subsection 41(3) of the Canadian Human Rights Act.

> (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that
>
> (a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
>
> (b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,
>
> the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

When paragraph 41(3)(a) of the federal legislation is compared with paragraph 41(3)(b) thereof, it seems paragraph 41(3)(a) allows for a punitive award. That is, even though a victim has not suffered in respect of feelings or self-respect as a result of

discrimination (that is, paragraph 41(3)(b) of the federal Act does not apply), the victim is entitled to "compensation" up to $5,000.00 if the discriminator is "engaging or has engaged in a discriminatory practice wilfully or recklessly". With paragraph 41(1)(a) there does not even have to be mental anguish, although one presumes there would always be mental anguish in such a situation. The doubt that arises in interpreting paragraph 40(1)(b) of the new Code arises because the last three lines conclude with "compensation may include an award ... for mental anguish", whereas it seems possible to make an award for hurt feelings, pain or suffering, or mental anguish, from an infringement that has not "been engaged in wilfully or recklessly", under the first two lines of paragraph 40(1)(b).

In my view, the last three lines of paragraph 40(1)(b) of the Ontario Code must be interpreted as meaning that an award beyond mere compensation (which may be awarded under the first two lines of paragraph 40(1)(b)) may be given, and such award can have a punitive element (even though called monetary "compensation") when the circumstances of the last three lines are present.

I would award general damages in the instant situation for the Complainant Cindy Cameron's loss of dignity and self-respect, loss of her right to freedom from discrimination, and for mental pain and suffering or mental anguish, in the amount of $2,000.00. This award is made within the framework of the first two lines of paragraph 40(1)(b).

Although the Respondent, Mrs. Nelson, bore no ill-will or malice toward the Complainant, the Respondent was "reckless" in her dealing with her, within the meaning of paragraph 40(1)(b). Mrs. Nelson could quite easily have tested Ms. Cameron's ability to lift a patient, through a simulated exercise. She chose not to, relying simply upon her impressionistic judgment which was, as I find, quite wrong and unfair. The infringement of the Code by Mrs. Nelson was "engaged in ... recklessly" and caused substantial mental anguish to Ms. Cameron. Accordingly, I consider that I could award general damages within the framework of the last three lines of paragraph 40(1)(b) beyond the award made

under the first two lines of paragraph 40(1)(a), but considering all the circumstances of this case, I do not think a punitive award is appropriate. It is suffice to award a total of general damages of $2,000.00 within the framework of paragraph 40(1)(b).

Interest.

It has been held in recent decisions under the old Code that interest is payable on both special damage and general damage awards along the approach of interest awards as stipulated by the Judicature Act. See Olarte et al., v. Commodore Business Machines and DeFilippis, supra at D/1749 and Mears v. Ontario Hydro, supra. In my view, interest is payable similarly in respect of damage awards under the new Code.

The commencement date for interest is the time of service of the complaint upon the respondents, which was some time before December 31, 1982. The applicable interest rate is that established by the Bank of Canada for the month previous to the month in which service of a complaint is effected, in this case November, 1982. The applicable Bank of Canada interest rate for November, 1982, was 13 percent.

ORDER

This Board of Inquiry having found the Respondents, Nel-Gor Castle Nursing Home and Mrs. Merlene Nelson, to be in breach of subsection 4(1) and section 8 of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982, in respect of the Complainant, Ms. Cindy Cameron, for the reasons given, this Board of Inquiry orders the following:

1. The Respondent, Nel-Gor Castle Nursing Home, shall offer in writing to the Complainant, Cindy Cameron, employment in the position of nurse's aide at the nursing home, when a position as a nurse's aide next becomes available due to a vacancy, and the Complainant shall have seven days after receipt of such offer of employment to accept the offer by written notice of acceptance delivered to Nel-Gor Castle Nursing Home.

2. The Respondents are jointly and severally liable to pay forthwith to the Complainant, as follows:

   (a) as damages for lost wages, the sum of nineteen hundred and fifteen ($1,915.00) dollars;

   (b) as general damages, the sum of two thousand ($2,000.00) dollars; and

   (c) as interest in respect of the awards of damages, the sum of six hundred and thirty-six ($636.00) dollars.

3. The Respondents shall cease and desist forthwith in discriminating because of handicap in the hiring of employees.

Dated at Toronto this 30th day of April, 1984.

Peter A. Cumming, Q.C.
Board of Inquiry.